

(28,118)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 761.

GENERAL INVESTMENT COMPANY, APPELLANT,

vs.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY
COMPANY ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

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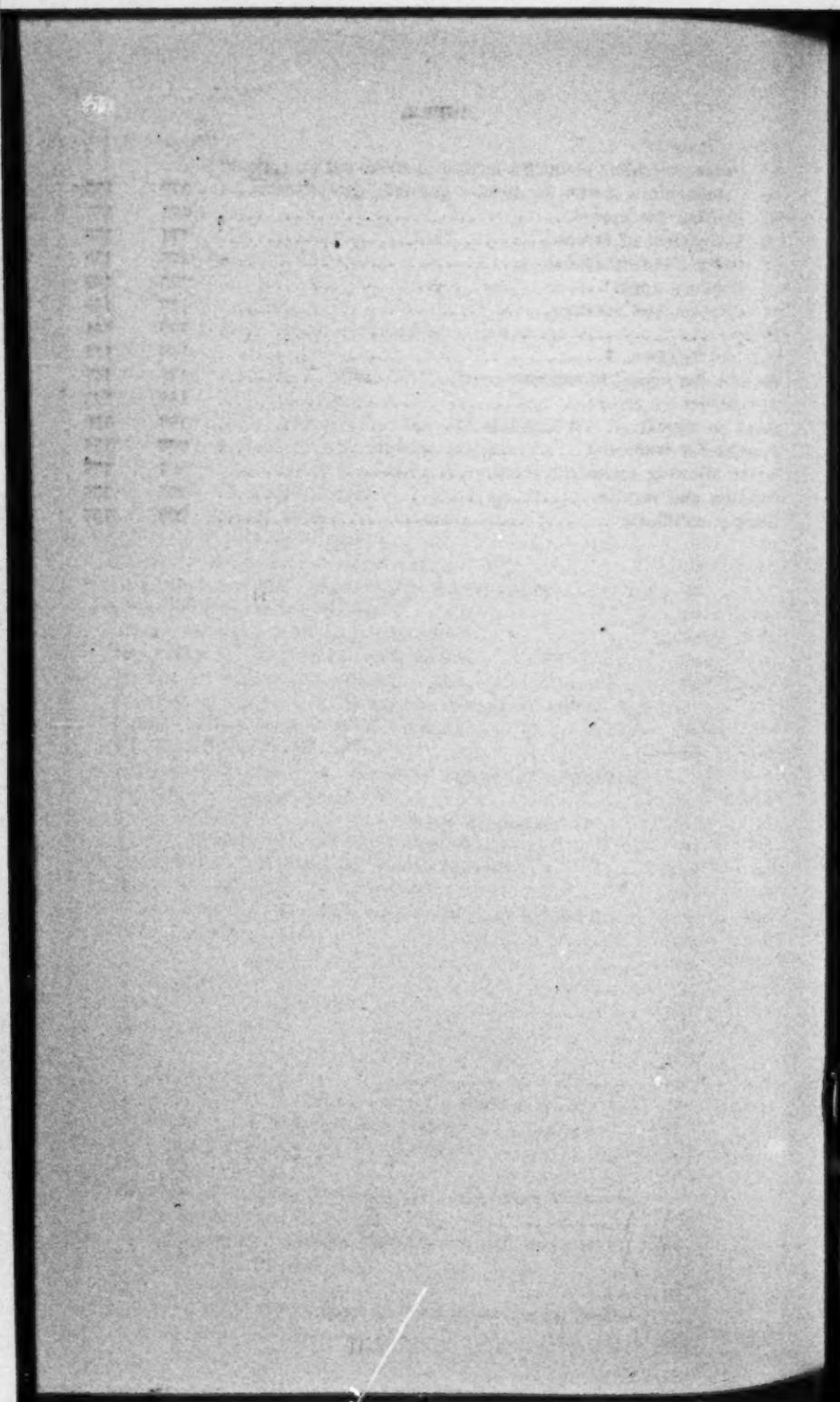
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Caption.

UNITED STATES OF AMERICA,

Northern District of Ohio, Eastern Division, ss:

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said Court begun and held at the City of Cleveland, in said District, on the first Tuesday in April, being the 4th day of said month, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America the one hundred and fortieth, to-wit: on Thursday, the sixth day of April, A. D. 1916.

Present: Honorable John M. Killilea, United States District Judge.

GENERAL INVESTMENT COMPANY

VS.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
Central Trust Company of New York, New York Central & Hudson River Railroad Company, William A. Read, Henry Evans, and Willis D. Wood.

Said action was commenced on the 3rd day of February, A. D. 1915, and proceeded to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned and orders of the Court were made and entered in the order and on the dates hereinafter stated, to-wit:

Record, Vol. 936, Page 498.

THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

No. 142,107.

GENERAL INVESTMENT COMPANY, Plaintiff,

vs.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY
et al., Defendants.

Injunction and Equitable Relief.

App. Doc. 281.

September Term, 1914.

Be it remembered that heretofore, to-wit: at a term of said Court of Common Pleas, begun and held at the Court House, in the City of Cleveland within and for the County of Cuyahoga and State of Ohio, on the 1st day of September in the year of our Lord one thousand nine hundred and fourteen, by and before their Honors: Frank E. Stevens, Thomas M. Kennedy, Charles J. Estep, George L. Phillips, Alvin J. Pearson, Lucas W. Collister, William B. Neff, Willis Vickery, Frank B. Gott, Martin A. Foran, Carl D. Friebolin, and P. L. A. Leighley, Judges of the Court of Common Pleas of the Eleventh Judicial District of the State of Ohio.

And thereupon on the 8th day of December, A. D. 1914, there was duly filed in said Court of Common Pleas a certain Petition in this cause which is in the words and figures following, to-wit:

STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

GENERAL INVESTMENT COMPANY, Plaintiff,

vs.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,
Central Trust Company of New York, New York Central and Hudson River Railroad Company and William A. Read, Henry Evans, and Willis D. Wood, Defendants.

Petition for Injunction and Equitable Relief.

Plaintiff, General Investment Company, is a corporation organized and existing under and by virtue of the laws of the State of Maine. Defendant, The New York Central and Hudson River Railroad Company (herein sometimes called the "New York Central Company"), is a railroad corporation organized and existing under the laws of the State of New York, and was formed on or about April 16, 1913, under the railroad law of New York by the consolidation of a former New York corporation of the same name with various other corporations.

3 It has a capital stock amounting to \$225,581,066.00, divided into 2,255,810.66 shares of the par value of \$100.00 each. Hereafter, where the context calls therefor, it is intended by "New York Central Company" to refer both to it and said former corporation of the same name. Defendant, Central Trust Company of New York, is a corporation organized and created under the laws of the State of New York for various purposes, among which is that of acting as trustee and financial agent in various capacities, as well as the transaction of a banking business. Defendant, The Lake Shore and Michigan Southern Railway Company (herein sometimes called the "Lake Shore Company"), is a consolidated railroad corporation organized and existing under and by virtue of the laws of New York, Pennsylvania, Ohio, Michigan, Indiana, and Illinois, and was formed by agreement of consolidation entered into on or about June 22, 1869, in pursuance of the provisions of the laws of said several states, and is a domestic corporation in the State of Ohio, and is subject to the laws of said state, as well as to the laws of the said other states aforesaid, and to those of the United States. Defendant, The Lake Shore Company, has an authorized capital stock of \$50,000,000.00, consisting of 500,000 shares of the par value of \$100.00 each, all of which is outstanding except that 39 shares thereof are held in the treasury of said company. Of said capital stock, \$533,500.00 is what is known as "guaranteed ten per cent preferential stock", entitled to guaranteed annual dividends of ten per cent per annum, and entitled to share with the ordinary stock of the corporation in any dividends above that rate. Of said stock so outstanding, 452,892 shares are, and ever since 1898 have been, owned by the New York Central and Hudson River Railroad Company, defendant herein, and said New York Central Company thereby has dominated and controlled, and is now dominating and controlling the affairs, management and policy of the Lake Shore Company. The New York, Chicago and St. Louis Railroad Company (herein sometimes called the "Nickel Plate Company") is a railroad corporation chartered September 27, 1887, and existing under and by virtue of the laws of New York, Pennsylvania, Ohio, and Indiana. It has outstanding a total of \$30,000,000.00 in par value of preferred and common capital stock, the shares thereof being of the par value of \$100.00 each. On or about October 1st. 1887, the Lake Shore Company, ac-

quired, and has ever since held, more than \$15,000,000.00 in
4 par value of said stock of said Nickel Plate Company, constit-
uting a controlling interest therein, and it has thereby dom-
inated and controlled, and is now thereby dominating and control-
ling, through such ownership, the affairs, management and policy of
said Nickel Plate Company. The Cleveland, Cincinnati, Chicago and
St. Louis Railway Company (herein sometimes called the "Big Four
Company"), is a corporation organized under the laws of Ohio on
or about June 27, 1889, as a consolidation of three other railroad
companies. Said Big Four Company now has outstanding preferred
and common stock aggregating \$57,058,300.00, the shares being of
the par value of \$100.00 each. Of said stock, the defendant, Lake
Shore Company, has for many years past owned, and now owns, a
controlling interest, now represented by 302,077 shares of an aggre-
gate par value of \$30,207,700.00 of the common stock. Through
said ownership, said the Lake Shore Company has, during the period
of its ownership of said stock, dominated and controlled, and now
dominates and controls, the affairs, management and policy of said
Big Four Company. The Lake Erie and Western Railroad Com-
pany (herein sometimes called the "Lake Erie Company") is a cor-
poration organized and existing under and by virtue of the laws of
the State of Ohio, and has an outstanding capital stock
consisting of \$11,840,000.00 preferred and \$11,840,000.00
of common. Of such outstanding stock, defendant, Lake
Shore Company, owns, and for a number of years past has
owned, a majority of each class, to-wit: \$5,980,000.00 of preferred and
\$5,940,000.00 of common. Through said ownership of stock, the
Lake Shore Company has for many years past dominated and control-
led, and now dominates and controls, the affairs, management
and policy of said Lake Erie Company. The Toledo and Ohio Central
Railway Company (herein sometimes called "Ohio Central Com-
pany") is a corporation organized and existing under and by virtue
of the laws of the State of Ohio, and has an outstanding capital stock
consisting of \$6,500,000.00 of common and \$3,708,000.00 of pre-
ferred. Of such outstanding stock, the Lake Shore Company owns
\$3,701,400.00 of the preferred and \$5,846,300.00 of the common.
Thereby the Lake Shore Company has for many years past domi-
nated and controlled, and now dominates and controls, the affairs,
management and policy of said Ohio Central Company. The Cin-
cinnati Northern Railroad Company is a corporation organized and
existing under the laws of the State of Ohio and has an out-
5 standing capital stock of \$3,000,000.00, all of one class, of
which the said Big Four Company now owns, and for some
years past has owned, a majority, to-wit: \$1,707,400.00. Thereby
said Big Four Company, for some years past, has dominated and control-
led, and now dominates and controls, the affairs, management and
policy of said The Cincinnati Northern Railroad Company. The
Michigan Central Railroad Company (herein sometimes called the
"Michigan Central") is a corporation organized and existing under
and by virtue of the laws of the State of Michigan, and for many
years past has had, and now has, an outstanding capital stock of \$18,-
738,000.00, of which defendant, New York Central Company, now

owns, and since 1898 has owned, \$16,819,300.00. Thereby defendant, New York Central Company, now dominates and controls, and since 1898 has dominated and controlled, the affairs, management and policy of said Michigan Central Company. The West Shore Railroad Company (herein sometimes called West Shore Company) is a corporation organized and existing by virtue of the laws of the State of New York. It has an outstanding capital stock of \$10,000,000.00, all of which is owned by defendant, New York Central Company. The line of railroad of said West Shore Company extending from the city of New York to the city of Buffalo was leased to the New York Central Company for a period of four hundred and seventy-five years from January 1, 1886. Thereby New York Central Company now dominates and controls, and for many years past has dominated and controlled, the affairs, management and policy of said West Shore Company. The Chicago, Indiana and Southern Railroad Company (herein sometimes called "Indiana Southern") is a corporation organized and existing under and by virtue of the laws of the States of Indiana and Illinois. It has an outstanding capital stock of \$20,000,000.00, consisting of \$5,000,000.00 of preferred and \$15,000,000.00 of common. Thereof, the Lake Shore Company now owns, and for a number of years past has owned, \$5,000,000.00 of the preferred and \$12,000,000.00 of the common. The remainder is owned by The Michigan Central. Thereby the Lake Shore Company now dominates and controls, and for a number of years past has dominated and controlled, the affairs, management and policy of said Indiana Southern. The Western Transit Company is a corporation organized and existing under the laws of the State of New York

and was incorporated December 1, 1883, for the purpose of transportation by water. The said company has an outstanding capital stock of \$1,000,000.00, all of which is now and for some years past has been, owned by the defendant, New York Central Company. Thereby the affairs, management and policy of said Western Transit Company are now dominated and controlled, and for many years past have been dominated and controlled by said New York Central Company. The New York State Railways Company is a corporation organized and existing under and by virtue of the laws of New York, and has an outstanding capital stock of about \$19,000,000.00, of which about \$13,604,000.00 is now and for some years past has been, owned by the defendant, New York Central Company. Thereby New York Central Company now dominates and controls, and for a number of years past has dominated and controlled, the affairs, management and policy of The New York State Railways Company. By reason of the stock ownership aforesaid, New York Central Company has caused to be elected a majority of its own directors as directors of The Lake Shore Company, Michigan Central Company, Nickel Plate Company, Big Four Company, Lake Erie Company, The West Shore Company, The Western Transit Company and New York State Railways Company. The said majority of directors of the New York Central Company so elected as directors of the other companies constitute a majority of the board of each of said companies. It thereby has dominated and controlled and now dominates and controls the affairs, management and policy of all of said

subsidiary railroads and transportation companies in this petition named. The New York Central Company owns and operates, and for many years past has owned and operated a line of railroad extending from the city of New York on the east bank of the Hudson River near Albany to the city of Buffalo, and since January 1, 1886, has owned the entire capital stock of The West Shore Company, and operated and now operates under a lease the line of road of said West Shore Company extending from Weehawken on the Hudson River opposite the city of New York, to the city of Buffalo, New York, the said West Shore Railroad being a parallel and naturally competing line with that of the New York Central for the entire distance of some 440 miles from New York to Buffalo in said States of New York. The Michigan Central Company owns or otherwise controls, through stock ownership, leases and trackage rights, and now operates, and

7 for some years past has so owned, controlled and operated, a line of railroad extending from Buffalo, New York, to Detroit, Michigan, Toledo, Ohio, and Chicago, Illinois, and various other intermediate cities and towns. The Lake Shore Company for many years past has owned and operated, and now owns and operates, a line of railroad extending from Buffalo along the south shore of Lake Erie through Dunkirk, New York, Erie, Pennsylvania, Ashtabula, Painesville, Cleveland, Elyria, Sandusky and Toledo, Ohio, and various other intermediate points and thence through the cities of Elkhart, South Bend and La Porte, Indiana, to the city of Chicago, Illinois, and other intermediate points. It has also a line running from Toledo to Detroit, one running from Waterloo on its main line to Ft. Wayne, Indiana, and branches to various towns and cities in Ohio, Indiana and Michigan. The Nickel Plate Company now owns and operates, and for many years past has owned and operated, a line of railroad extending from the city of Buffalo along the south shore of Lake Erie; through Dunkirk, New York, Erie, Pennsylvania, Ashtabula, Painesville, Cleveland and other places in Ohio, and thence through Ft. Wayne and other places in Indiana to Chicago, Illinois. The Big Four Company now owns or otherwise controls and operates, and for a number of years has so owned, controlled and operated, a system of railroads in Ohio, Indiana, Illinois and Michigan, extending from Cleveland and Sandusky to the cities of Columbus, Springfield, Dayton and Cincinnati and other intermediate places in Ohio, and to Indianapolis, Muncie and other places in Indiana, and to Chicago, Peoria, Bloomington, Kankakee, and other places in Illinois, to St. Louis, Missouri. The Lake Erie Company now owns and otherwise controls and operates, and for a number of years past has owned, controlled and operated lines of railroad in Ohio, Indiana and Illinois extending from Sandusky, Ohio, through Findlay, Lima and other places in Ohio and thence through Muncie, Anderson and other places in Indiana to Indianapolis, and from Muncie to La Fayette in Indiana, and thence through Illinois to Bloomington, Peoria and other places. The Cincinnati Northern Railroad Company now owns or controls and operates, and for a number of years past has owned, controlled and operated, a line of railroad from Franklin Junction on the line of the Big Four Com-

pany south of Dayton, northward through the western part of Ohio, to Jackson, Michigan. The Ohio Central Company now owns, leases or otherwise controls a system of railroads in Ohio, consisting 8 principally of two separate lines running from Toledo south-
erly and southeasterly to the Ohio coal fields, one by way of Bowling Green, Findlay, Kenton and other intermediate places to Columbus and Truro Junction; the other, running by way of Fostoria, Bucyrus and Mt. Gilead to Thurston on the Zanesville and Western Railroad. The said Ohio Central Company also owns and operates a road extending from Peoria, Ohio, on its main line, to St. Marys, Ohio, connecting there with the lines of the Lake Erie Company. The Indiana Southern Company now owns or otherwise controls and operates as main lines a line of road extending from Indiana Harbor, Indiana, southerly through the western part of Indiana to Danville in the easterly part of Illinois, where said line of road connects with the road of the Big Four Company extending through Paris, Illinois, to St. Louis, Missouri, and Cairo, Illinois. The other main line of said Indiana Southern Company extends from South Bend, in the northern part of Indiana in a southwesterly direction through Kankakee, in Illinois, where connection is made with the line of the Big Four Company, to a point in the central part of Illinois near the town of De Pue. The Western Transit Company now owns and operates, and for many years past has owned and operated a line of freight and passenger steamers on the Great Lakes running between the cities of Buffalo, New York, Detroit and Mackinac City, in Michigan, Milwaukee in Wisconsin and Chicago in Illinois. The New York State Railways Company now owns and controls, by stock ownership, lease, or otherwise, various lines of street and interurban railroad between Albany and Rochester in New York, including the systems in Schenectady, Utica, Syracuse and Rochester, New York. Their lines closely parallel the main lines and branches of the New York Central Company and the West Shore Company for a large part of the distance between the cities before mentioned. A large proportion of said trolley lines are not feeders to the railroads of said New York Central and West Shore Companies, but are parallel and naturally competing lines between the various cities reached by them. The lines and systems of all of said companies aforesaid are and were at the time or times of the acquisition of the control thereof by the New York Central Company lines parallel to each other (in the sense of the Ohio consolidation statute) and to the lines of the New York Central Company and naturally were lines potentially competing with each other and with the lines of the New York Central Company in commerce, inter and intrastate, and with foreign countries.

9 The Lake Shore Company and the New York Central Company in so acquiring the control of the companies above named, acted with the intent of securing thereby the control of parallel and naturally competing lines for the purpose of restraining trade and commerce and suppressing competition in the several states wherein said lines are located, and between said several states and other states and on the Great Lakes and with foreign countries. By

their acts they have accomplished said intent and purpose, and the combination so formed still exists, and they purpose to continue the same and to still further strengthen and perfect the same as hereinafter set forth. The acquisition by the New York Central Company of the control of The Lake Shore Company was, at the time thereof, and its holding is now, in violation of the common law, of the Railroad law and anti trust acts of the Legislature of the State of New York, of Section 14 of the Stock Corporation law of New York, of the anti-trust act of the United States known as the Sherman Act, passed in 1890 and was and is in violation of Section 4 of Article 17 of the Constitution of the State of Pennsylvania, of the Valentine Anti-Trust Act of the State of Ohio, and of the public policy of said state; of the public policy of the State of Indiana as announced by the decisions of the Supreme Court of that state, and of Section 2 of Article 11 of the Constitution of the State of Illinois, in that the Lake Shore Company at the time the New York Central Company obtained control thereof, owned the controlling interest in the stock of the Nickel Plate Company, whose line of railroad from Buffalo to the western boundary of New York was, as it still is, parallel to and a potential competitor of the line owned and operated by said Lake Shore Company, and in that the lines of both the Lake Shore and Nickel Plate Companies extended from Buffalo, New York, to Chicago, Illinois, through New York, Pennsylvania, Ohio, Indiana and Illinois, and were then as they are now, engaged in inter and intra-state trade and commerce, and were then, as they are now, parallel and potentially competing lines, and further, in that at the time of such acquisition the Lake Shore Company also controlled a majority of the capital stock of the Big Four Company, which company owned and controlled, (as it now does) through stock ownership, leases and trackage rights, and operated (as it now does) a line of railroad between Cleveland, Ohio, and Chicago, Illinois, and was engaged in inter and intra-state trade and commerce, and was 10 potentially a competitor of said Lake Shore and Nickel Plate Companies, and also owned and controlled other lines of railroad extending throughout Ohio, Indiana and Illinois. The acquisition by the New York Central Company of the controlling interest in the capital stock of the Michigan Central Company was at the time thereof, and the holding of it still is, in violation of the common law; of the Sherman Anti-trust Act of Congress; of the Valentine Anti-Trust Act and the public policy of the State of Ohio; of Article 19, Section 2 of the Constitution of the State of Michigan; of the public policy of the State of Indiana as announced in the decisions of the highest court of said state, and of Article 11, Section 2, of the Constitution of the State of Illinois, in that the line of said Michigan Central Company from Buffalo, New York, to Chicago, Illinois, was, as it still is, parallel and potentially competing with the line of road of said Lake Shore Company between said cities and also the cities of Detroit, Michigan, and Toledo, Ohio, Grand Rapids, Lansing, Jackson, Ypsilanti and Kalamazoo, Michigan, and South Bend and Michigan City, Indiana; and in that the said line of the Michigan Central Company was, as it still is, parallel and potentially

competing with the line of road owned by the Nickel Plate Company between Buffalo, New York, and Chicago, Illinois. At the times of the illegal uniting of the lines of railroad and transportation companies hereinbefore referred to into one dominant control, not only were the lines of the New York Central Company within the state of New York parallel to the lines of the West Shore Company, and potential competitors thereof, but the lines of the Lake Shore Company, The Big Four Company, the Nickel Plate Company, and the Michigan Central Company's system were parallel lines and natural competitors of each other and of The Western Transit Company, and without the restraints and suppression of competition involved in and resulting from such illegal linking of the control thereof, would normally still be in active competition with each other for both inter and intra-state trade and commerce, and commerce with foreign nations. For the purpose of suppressing, however, such natural competition of said lines aforesaid the defendant, New York Central Company, in the manner hereinbefore set forth, and by successive steps forming part of one continuous plan, concentrated in one ownership, in the manner herein set forth, the control, direct

11 or indirect, of all of said railroad or transportation companies above referred to. Plaintiff says that in the course of the carrying out of such illegal and wrongful plan for the restraining of inter and intra-state commerce above referred to, the controlling interests of the New York Central Company conceived the plan of acquiring the control of the stock interests in the Michigan Central Company and the Lake Shore Company above outlined, and, in so doing, of also acquiring the control of the parallel and potentially competing lines of the Nickel Plate Company, the Big Four Company, and the other railroad and transportation companies herein referred to. In pursuance of the carrying out thereof, they caused to be authorized by the New York Central Company a certain issue of 3½ per cent collateral trust bonds of the New York Central Company, the authorized amount thereof being \$100,000,000.00, and the date thereof being February 1, 1898, and the maturity thereof being February 1, 1998. The instrument of collateral pledge securing such issue of 3½ per cent bonds bore date February 1, 1898, and provided for the deposit with the Guaranty Trust Company of New York, as trustee, of the purchased stock of the Lake Shore Company constituting such control. Said instrument of pledge, among its provisions, contained the following: "The Railroad Company (New York Central Company) will not hereafter make any mortgage upon its railroad, or upon any substantial part thereof, without also thereby including therein, in favor of every bond secured by this indenture, a lien and charge prior and superior to the lien in favor of any other bond of debt secured by any such mortgage, etc." Said indenture further provided that until the New York Central Company should be in default in the payment of interest, principal, taxes or other governmental charge, it might have the right to vote at all corporate meetings and elections of the Lake Shore Company upon all shares of that Company's stock pledged under such instrument of pledge, but such voting power

was limited by restrictions contained in such indenture, prohibiting the New York Central Company from voting in favor of any increase of the capital stock of said Lake Shore Company, and (unless expressly authorized by the holders of 75 per cent in amount of the bonds issued and outstanding under such indenture) in favor of any consolidation of the Lake Shore Company with any other railway or transportation company, either by purchase of stock or otherwise.

12. In said indenture was further contained the following clause, to-wit: "The pledge hereunder of the said shares shall not

prevent the consolidation or merger of The Lake Shore and Michigan Southern Railway Company with, or the sale, conveyance or transfer of its property to, the Railroad Company, upon such terms as shall be approved by the holders of seventy-five per cent in amount of the bonds secured by this indenture; but, anything in this indenture contained to the contrary, notwithstanding. In case of such express approval, but not otherwise, such consolidation, merger or sale may be made under any laws to which such Companies then may be subject; Provided, that in connection with such consolidation no lien or charge shall be created or incurred except in subordination and subjection to the prior claim, lien and charge of the bonds secured by this indenture; and in the event of the consolidation or merger of said The Lake Shore and Michigan Southern Railway Company, with, or the sale of its property to, the Railroad Company, this indenture immediately shall become and be a lien upon the property of The Lake Shore and Michigan Southern Railway Company so consolidated or merged with, or sold to, the Railroad Company, with the same force and effect as if expressly conveyed by this indenture, and the holders of the bonds hereby secured always shall have upon such property of The Lake Shore and Michigan Southern Railway Company, a lien as full and complete as that upon its shares of capital stock hereunder created by the pledge thereof to the trustee hereunder. The assignment or pledge hereunder of the shares of stock of The Lake Shore and Michigan Southern Railway Company shall not prevent the consolidation or merger with such Railway Company of any other railroad corporation, nor shall it prevent the sale of the property of any other railroad corporation to The Lake Shore and Michigan Southern Railway Company, upon such terms as shall be approved by the holders of seventy-five per cent in amount of the bonds secured by this indenture, but not without such express approval, and in such case the portion of the capital stock of any company formed by such consolidation, merger or purchase (but never less than a majority thereof) issued for and in lieu of any of the stock previously pledged hereunder, shall always bear to the total capital stock of the consolidated company, a relation proportionately at least as high as that borne by such previously pledged stock to the total capital stock of the constituent companies forming such consolidated company. Such portion of such stock of such consolidated, merging or purchasing company, and also any bonds or other securities issued by such consolidated, merging or purchasing company, in exchange for any stock theretofore deposited with and held by the

trustee hereunder shall be deposited with the trustee, duly endorsed for transfer and immediately shall become and shall be subject to the lien of this indenture, with the same force and effect as though hereby expressly pledged; and the holders of the bonds hereby secured shall always have and retain, in respect to such portion of such stock, bonds or other securities of such consolidated, merging or purchasing company, a lien as full and complete as that hereby created in respect of the stock of such Lake Shore and Michigan Southern Railway Company, by reason of the pledge hereunder of such shares of capital stock. The trustee may do any and all acts proper to carry into effect the purposes of this section. But no merger, consolidation or lease shall be made or permitted as in this section authorized unless nor until the Railroad Company (meaning the New York Central) shall have first executed and delivered its second mortgage upon its railroad as hereinbefore provided in section 5 of Article Two, for the security of the bonds issued hereunder." Under said indenture and secured thereby and by the pledge of such control of stock of the Lake Shore Company, the New York Central Company issued, and there are now outstanding, \$90,578,400.00 in par value of the New York Central Company's so-called Lake Shore collateral trust 3½ per cent bonds. The amount of stock of the Lake Shore Company so pledged under such indenture amounted in par value to \$45,289,200.00, was the stock purchased by the use of such collateral trust bonds, and constituted the stock control of said Lake Shore Company. Plaintiff further says that at approximately the same time, and in pursuance of said illegal plan for the suppression of competition above outlined, the controlling interests in said New York Central Company caused said company to authorize another issue of so-called collateral trust 3½ per cent bonds, secured by indenture of pledge of substantially the same tenor and effect as that above outlined with reference to the Lake Shore Company collateral trust 3½ per cent bonds, and caused to be issued thereunder—and there are now outstanding thereunder—\$19,336,000.00 in par value of so-called Michigan Central collateral trust 3½ per cent bonds of the New York Central Company, maturing

14 February 1, 1998. Deposited as security for said last named collateral trust bonds there are 168,193 shares of the capital stock of the Michigan Central Company, of an aggregate par value of \$16,819,300.00, such stock constituting the controlling interest in the stock of the Michigan Central Company, and being the stock so acquired by the New York Central Company as a part of, and in pursuance of, said illegal plan for the suppression of competition in inter and intra-state commerce above referred to. Plaintiff says that such controlling interests in said stock of the Michigan Central and the Lake Shore Companies having so been obtained, and such contractual obligations having so been entered into by the New York Central Company with the holders of such collateral trust 3½ per cent bonds above referred to, said the New York Central Company, as the next step in such plan for the ultimate complete restraint of inter and intra-state commerce upon the lines of the various railroad and transportation companies above named, and having contracted

as above set forth with the holders of such collateral trust $3\frac{1}{2}$ per cent bonds that no consolidation of the Lake Shore or the Michigan Central Companies with any other company should be carried into effect without the consent in each case of the holders of seventy-five per cent of the collateral trust bonds issued against such purchased stock, conceived and formulated a plan for consolidating the lines of the New York Central Company above referred to with the lines of the Lake Shore Company above referred to, and the merging of their corporate entities, along the lines and in the manner herein-after more specifically set forth. As a step in such consolidation plan, and for the purpose of, as a part of said consolidation making payment to the holders of seventy-five per cent in amount of said collateral trust $3\frac{1}{2}$ per cent bonds secured by deposit of stock of the Lake Shore Company, and in violation of the laws of the states of Ohio and New York in reference to the consolidation and merger of railroad corporations, said controlling interests in the New York Central Company prepared and caused to be issued to the holders of said New York Central Company's $3\frac{1}{2}$ per cent gold bonds, (Lake Shore collateral) a circular offering to them, in consideration of their consent to the consolidation of the New York Central Company with the Lake Shore Company, and with other of the so-called New York Central lines, and on condition that such consolidation be consummated, an opportunity to exchange their $3\frac{1}{2}$ per cent bonds, par for par, for 4 per cent mortgage bonds of the New York Central

15 Company, to be made payable February 1, 1998, and to be secured by a new mortgage of the New York Central Company creating a general lien upon the railroads then owned by the New York Central Company, upon its lease holds in the West Shore Company, and in three other railroad lines in the state of New York, and on certain other property more specifically described in said offer. In such offer it was provided that any of such 4 per cent bonds might be issued par for par only in exchange for and to retire such $3\frac{1}{2}$ per cent bonds, (Lake Shore collateral) the Michigan Central collateral bonds above referred to, and certain debentures of the New York Central Company referred to therein; said 4 per cent mortgage also securing by prior lien all such of said $3\frac{1}{2}$ per cent bonds (Lake Shore collateral and Michigan Central collateral) as might not be exchanged for 4 per cent bonds. Said offer further set forth to said bond holders (as a part of such unlawful plan), that such new 4 per cent bonds would be, after merger, secured further by a mortgage on the railroad of the Lake Shore Company. Such offer, however, provided that the exchange therein contemplated should take place only after the consummation of the illegal consolidation between the New York Central Company and the Lake Shore Company above referred to. Such offer so presented to said collateral trust bond holders was accompanied by a proposed consent to such exchange, setting forth, as a part of its terms, a statement by any assenting bondholder to the effect that his consent and approval to such consolidation should be given in consideration of the offer made to consenting holders of the New York Central's Lake Shore collateral trust $3\frac{1}{2}$ per cent bonds of the privilege, following consolidation, of exchanging such bonds, par for par, for such 4 per cent

bonds above referred to. Plaintiff says that such offers having so been made, the holders of seventy-five per cent of said 3½ per cent (Lake Shore collateral) bonds executed said consents above referred to, and in so doing agreed, in consideration of the promise of the New York Central Company to give to them such 4 per cent bonds in place of their 3½ per cent bonds after the consummation of such proposed consolidation, to the voting by or at the instance of the New York Central Company of said pledged stock constituting the control of the Lake Shore Company, as above set forth, in favor of the merger or consolidation agreement and plan referred to in

16 said offer and acceptance, and hereinafter more specifically described. Plaintiff says that in further pursuance of such plan for such unlawful combination in restraint of trade and commerce, and in pursuance of the provisions of such offer and acceptance above outlined, said controlling interests in the New York Central Company caused to be prepared and executed by the New York Central Company, and delivered to the Bankers Trust Company, a certain so-called consolidation mortgage, covering the lines of railroad owned by it, and certain stock and leasehold interests held by it, and providing for the issuance of not to exceed \$167,102,400.00 of 4 per cent bonds, to mature on the first day of February, 1998, the bonds so secured including the \$90,578,400.00 of 3½ per cent Lake Shore collateral bonds of the New York Central Company, and \$19,386,000.00 of the 3½ per cent Michigan Central collateral bonds of the New York Central Company above referred to. Said consolidation mortgage provided by its terms that the 4 per cent bonds issued thereunder might from time to time be issued after consolidation in exchange for and retire said Lake Shore and Michigan Central collaterals above referred to.

Plaintiff says that in said 4 per cent mortgage, and in fulfillment of a provision in the offer to the Lake Shore collateral 3½ per cent bondholders above referred to, it was provided that the holders of the unexchanged 3½ per cent Lake Shore collateral bonds should have a mortgage lien prior to that of the 4 per cent bonds upon the railroads of the New York Central and Lake Shore Companies, and that such new 4 per cent bonds so to be issued in exchange for 3½ per cent Lake Shore collateral bonds would be secured, not only by the security above referred to and described, but also by a lien on the railroad then owned by the Lake Shore Company.

Plaintiff says that at the time of the acts above complained of, the controlling stockholders of the New York Central Company, whose representatives its directors were, in the performance of the acts above set forth were themselves, either directly or through members of their families, the owners of, or financially interested in the ownership of, large amounts of said collateral trust 3½ per cent bonds of the New York Central Company secured by Lake Shore and Michigan Central stock as collaterals as above described, and in providing for, and arranging for, the ultimate exchange for such 3½ per cent bonds for the 4 per cent bonds above referred to were not only providing for themselves additional interest to that given them 17 by their 3½ per cent bonds, which had still about eighty-five years to run, but were also providing for themselves ad-

ditional security in the shape of an additional lien upon the railroad of the Lake Shore Company, and one upon the railroad of the New York Central Company, the effect of such proposed exchange after consolidation being to cause the system and line of the Lake Shore Company to be mortgaged as security for the payment of indebtedness of the New York Central Company originally created in the acquisition of the shares of the stock of the Lake Shore Company, and also as security for indebtedness of the New York Central Company created in the acquisition by the New York Central Company of the control of the stock of the Michigan Central Company as above set forth.

Plaintiff says that as a next and further step in said proposed illegal consolidation of the lines and corporate entities of the Lake Shore and New York Central Companies, said controlling interests in the New York Central Company, through the directors of said company, placed by them in control of its board of directors, and through the directors of the Lake Shore Company, also so as aforesaid named and selected by them, caused to be prepared and signed by said directors and by the directors of various other minor and subsidiary companies named in the consolidation agreement hereinafter referred to, a certain proposed agreement of consolidation or merger of the New York Central Company, the Lake Shore Company, and said subsidiary companies referred to therein, contemplating a merger of all the railroads, properties, and corporate entities of said companies, parties thereto. In substance, said proposed consolidation agreement provides as follows:

(1) The parties thereto are The New York Central and Hudson River Railroad Company, The Lake Shore and Michigan Southern Railway Company and nine other companies.

(2) The agreement recites the amount of outstanding capital stock and the number of directors of The New York Central Company and of The Lake Shore Company, as above set forth, and in like manner states the same facts as to the other nine companies.

(3) It provides for the consolidation of said eleven companies into a single corporation under the name of The New York Central Railroad Company. It fixes its number of directors at fifteen. It gives the names and places of residence of its directors for 18 the first year. It names the officers and places of residence of such officers for the first year. It fixes the principal office of the company in the City of Albany, New York, and,

(4) It fixes the amount of capital stock of said corporation at \$300,000,000.00, divided into 3,000,000 shares of the par value of \$100.00 each. It provides that of these shares 2,495,904.6 shares shall be issued in exchange for outstanding stock of the consolidating corporations. It provides that of said shares so to be exchanged, each stockholder of The New York Central and Hudson River Railroad Company shall be entitled to one share of stock of the consolidated corporation for each share of stock of The New York Central Company owned by him at the time the consolidation becomes

effective, thus giving to New York Central stockholders, 2,255,810.66 shares of stock of the consolidated corporation. It provides for the "cancellation" of the 452,892 shares of stock of The Lake Shore and Michigan Southern Railway Company owned by The New York Central Company, and for the cancellation in like manner of 39 shares of such stock held in the name of The New York Central Company's treasurer in trust for it. It provides that the other holders of the stock of The Lake Shore and Michigan Southern Railway Company, including the plaintiff herein, totaling 47,069 shares, shall be entitled to receive 235,345 shares of the stock of the consolidated corporation, each of said other stockholders so being entitled to five shares of the stock of the consolidated corporation for each share of the stock of the Lake Shore Company owned by him at the time said consolidation shall become effective.

(5) Said agreement refers to the fact that the capital stock of The Lake Shore Company owned by The New York Central Company so to be cancelled as above set forth are held by The Guaranty Trust Company of New York, as Trustee, in pledge under an indenture dated November 4, 1898, executed by The New York Central Company as security for an issue of its 3½ per cent gold bonds, of which said agreement recites there are \$90,578,400.00 outstanding. It further refers to the fact that the indenture securing said 3½ per cent bonds contains a clause providing that the pledge of said shares shall not prevent the merger of The Lake Shore Company with The New York Central Company upon such terms as shall be approved by the holders of seventy-five per cent in amount of the bonds secured thereby, and it refers further to the fact that 19 in said indenture of pledge it is provided that in any such consolidation no lien or charge shall be created or incurred except in subordination to the prior claim, lien and charge of said 3½ per cent bonds, and it further refers to the fact that in such indenture it is provided that in the event of a consolidation or merger of said Lake Shore Company and said New York Central Company, such indenture of pledge shall immediately become and be a lien upon the property of the Lake Shore Company so consolidated or merged with the New York Central Company "with the same force and effect as if expressly conveyed by this indenture, and the holders of the bonds hereby secured always shall have upon such property of The Lake Shore and Michigan Southern Railway Company a lien as full and complete as that upon its shares of capital stock hereunder created by the pledge thereof to the trustee hereunder." Said agreement recites that the holders of 75 per cent in amount of said bonds have given their approval to the consolidation contemplated by said agreement, and provides that holders of such 3½ per cent bonds shall have the right at any time following the consolidation, to have issued to them by the consolidated corporation, in payment and refunding of their bonds for which consents shall have been so given and accepted, 4 per cent consolidation mortgage gold bonds, Series A, of The New York Central Company for a principal sum equal to the principal sum of the bonds so surrendered.

(6) Said agreement further provides the details as to elections of directors and stockholders, the conveyance to the consolidated corporation of the properties and franchises of the merging companies and the assumption by the consolidated company of the debts and obligations of the merging companies. Said proposed consolidation agreement having so been prepared, the controlling interests in said New York Central Company, through said directors aforesaid, caused to be called stockholders' meetings of the various constituent companies, proposed parties thereto. The meeting of stockholders of the New York Central Company called for the purpose of considering the same was held on the 20th day of July, 1914, and it was there approved by the vote of two-thirds in amount of the outstanding capital stock of the New York Central Company, various stockholders of said company, including this plaintiff, voting against the approval and ratification thereof. In like manner, the meeting of stockholders of the Lake Shore Company for the consideration of such agreement was by said controlling interests called for said July 20, 1914, but through defects and irregularities in the giving of notices thereof, could not then legally be held, and has now been called, under new notices issued October 15, 1914, for December 22, 1914. Such meeting so called for said last named date is called to be held at the office of the company in the city of Cleveland, Ohio.

Plaintiff says that such stockholders' meeting so having been called or in anticipation thereof, the defendants Read, Evans and Wood, acting upon behalf of themselves and various holders of minority stock of the Lake Shore Company deposited with them under a stockholders' protective agreement prepared for such purpose, instituted, or caused to be instituted, various litigation in the Federal courts of Michigan, Ohio, and New York, in which they protested against such a proposed consolidation as illegal, as a combination in restraint of trade or commerce and sought to enjoin the same, and in like manner presented to the various public utilities and public service commissions of the various states through which the lines of railroad affected thereby passed, protests against such merger and consolidation.

Plaintiff says, however, that such protests having been so made, and such litigation having so been instituted, the controlling interests of the New York Central Company aforesaid caused a settlement to be effected with said committee, which resulted in the dismissal of such litigation and protests, and in the entering into by the Lake Shore Company and said Read committee, so-called, together with defendant Central Trust Company above referred to, of a certain agreement in writing, dated October 16, 1914, which provided and provides in substance as follows, to-wit:

(1) That said Railway Company agrees to purchase stock of the Railway Company to an amount not exceeding 15,000 shares, and deposited with or controlled by Committee, and to pay therefor \$500.00 per share in cash on December 15, 1914, at the office of the Trust Company.

(2) That the Railway Company shall, on the execution of said agreement, deposit with the Trust Company its promissory note in an amount equal to the purchase price aforesaid for the number of shares of said Railway Company's stock then on deposit with said Trust Company, said note to be dated October 15, 1914, payable to Read committee or bearer on December 15, 1914, without interest.

21 (3) That said committee agrees that said stock certificates so on deposit with the Trust Company shall be held by the Trust Company, and on payment of said note on or before December 15, 1914, said stock certificates and said note shall be delivered to the Railway Company, or order, and the cash paid on said note shall be held subject to the order of said Committee.

(4) That when and as requested by said committee on or before December 15, 1914, said Railway Company shall deliver to said Trust Company its notes of like date and maturity for the purchase price at the rate aforesaid of additional shares of said Railway Company's stock, certificates for which, duly endorsed in blank, shall have been deposited with said Trust Company, to an amount which, including that above referred to, shall not exceed in all an aggregate of 15,000 shares, and that all certificates for such stock, together with said notes, shall be held by said trust company in like manner, as above provided, and that upon payment of said additional note, said stock certificates and notes shall be in like manner as above provided, delivered to said Railway Company, or order, and the cash payment thereon held subject to the order of said committee.

(5) That said committee shall transfer to the Railway Company data, records and memoranda of investigations made for it or for William A. Read, of the books, records, accounts, history and property of said Railway Company, and of other subsidiary companies of the Railway Company, and that the Railway Company shall pay therefor to the Read committee, upon the execution of said agreement, the sum of \$200,000.00.

(6) That upon the delivery to the Trust Company of the notes provided for in paragraph 1 of said agreement certain actions theretofore brought and then pending in the Federal Courts of Michigan, Ohio, and New York should be discontinued; certain pending appeals from certain decrees in suits brought by the said committee be dismissed, and that notification be given by the said committee to the respective public service commissions where application for approval of the consolidation hereinafter referred to were then pending, and that all objections filed by or on behalf of said committee to such consolidation be withdrawn.

Plaintiff says that said agreement so entered into between the Lake Shore Company and said Read committee aforesaid is invalid and illegal for the following reasons among others to-wit:

22 1st. In the payment of said \$200,000.00 to the Read committee for the purposes aforesaid. The same constituted an unlawful diversion of the corporate funds of the Lake Shore Company and was ultra vires of said corporation.

2nd. The proposed purchase by the Lake Shore Company of its own corporate stock therein contemplated is unauthorized by the laws of the state of Ohio, and by the laws of the various states of its incorporation, is forbidden thereby, and is ultra vires of said corporation.

Such transaction, if consummated, would constitute an unlawful diversion of approximately \$7,500,000.00 of the corporate assets of the Lake Shore Company. In like manner said the Lake Shore Company has offered to other minority stockholders to purchase their stock at \$500.00 per share, and has with others of said stockholders entered into contracts so to purchase the same, and such offers and such contracts are in like manner and for the same reasons illegal and ultra vires of the corporation.

Such offers to and contracts with other minority stockholders all contemplate the purchase of their respective shares of stock at said \$500.00 per share on or before December 15, 1914. The entering into of said contracts with said Read committee, and said contracts with other minority stockholders, constitute additional steps in the efforts and plans of the controlling interests of the New York Central Company to consummate and carry out and perfect such illegal combination for the restraint of inter and intra-state trade and commerce, and trade and commerce with foreign nations above referred to. If consummated, not only will such combination in restraint of trade be perfected, but such proposed purchases of minority stock of the Lake Shore Company will deplete the Company's treasury to the extent of approximately \$20,000,000.00.

Plaintiff is and has been since June 27, 1914, the owner of five shares of the capital stock of the Lake Shore Company, and the same is and has been since said date registered in its name upon the books of said corporation; it brings this suit on behalf of itself and all other similarly situated stockholders of the Lake Shore Company who may join herein. In like manner, plaintiff is the owner of three hundred shares of the capital stock of the New York Central Company, and the same is registered in plaintiff's name upon the books of said company.

23 Plaintiff has been the owner and registered holder of said stock since February 24, 1914. Plaintiff has attended the meeting of stockholders of the New York Central Company called for the consideration of said consolidation agreement above referred to and voted and protested against the same. Said stock was also voted against the authorization of said consolidation 4 per cent mortgage above referred to.

By reason of plaintiff's ownership of stock of the New York Central Company as above set forth, it is equitably interested in the stock of the Lake Shore Company so owned by the New York Central Company in addition to the direct interest in the stock of the

Lake Shore Company represented by its ownership of said five shares aforesaid.

Defendant, The New York Central Company, is threatening to, and will unless restrained by order of this court, vote said stock of the Lake Shore company, amounting to 452,892 shares, now in its treasury in favor of said consolidation agreement aforesaid, and threatens so to do.

Plaintiff says that said proposed consolidation is unlawful and illegal for the following reasons, to-wit:

1st. It is a step taken in furtherance of, and in promotion of, the combination and conspiracy in restraint of trade above referred to.

2nd. It results in violation of the laws of Ohio in an increase of the capitalization of the consolidated company, by reason of the consolidation, to an extent greater than the aggregate sums of the capital stocks of the proposed consolidating companies.

3. It is a consolidation, one step in which is the payment through the exchange of said 4 per cent bonds for 3½ per cent bonds, of considerations for the right to vote stock of the Lake Shore Company in favor of such consolidation, such payment coming from the treasury of the proposed consolidated company, and it constitutes an increase of indebtedness for such unlawful purpose, and an illegal issue of bonds against and as a lien upon such contract for consolidation or merger—all in violation of Section 614-59, paragraph 62 of the General Code of Ohio. Under the terms of the agreement for consolidation \$45,289,200.00 of the capital stock of the Lake Shore Company is to be cancelled by the New York Central Company and the stock of the Lake Shore Company reduced in that amount, and in place of such stock the consolidating company is to assume and the property of the Lake Shore Company is to be

24 subjected to the lien of the New York Central Company's Lake Shore collateral 3½ per cent bonds and the New York Central consolidation mortgage 4 per cent bonds to be issued in exchange for such 3½ per cent bonds to the amount of \$90,578,400.00, and for the \$4,710,800.00 Lake Shore Company minority stock the consolidated company is to issue \$23,554,000.00 of new stock, the net result of which operation will be the issue by the consolidating company of stock and bonds to the amount of \$114,132,400.00 in place of \$50,000,000.00 capital stock of the Lake Shore Company, of which \$45,289,200.00 is now held and is to be cancelled by the New York Central Company, all of which is in violation of the letter and spirit of Section 614-59 of the Public Utilities Act. The said proposed consolidation is in further violation of said Section 614-59 in that the issue of 4 per cent bonds provided for under the consolidation mortgage in exchange for the Lake Shore collateral 3½'s aggregating \$90,578,400.00, and the Michigan Central collateral 3½'s aggregating \$19,338,000.00, a total of \$109,914,400.00 will create an indebtedness greatly in excess of that now outstanding in that the amount of annual coupons agreed to be paid upon such 4 per cent bonds would amount to \$549,572.00 more than the annual coupons

upon the 3½ per cent bonds, and each and every coupon on said 4 per cent bonds will constitute an indebtedness of the new company. The amount of such increased interest charge upon said \$109,914,400.00 of indebtedness during the life of said 4 per cent bonds, to-wit: until February 1, 1998, will if compounded at the rate of 4 per cent on each semi-annual payment of such increased interest charge, aggregate a sum in excess of \$350,000,000.00, and represent an increase in the aggregate amount of indebtedness to that extent.

4th. The issue of stock and bonds contemplated by said proposed consolidation has not been approved by the Public Service Commission of Ohio, which approval plaintiff alleges is a prerequisite therefor, and no application is now pending before said Commission to such effect.

5th. Because in the course of the carrying out of such illegal plan in the consummation of such consolidation, the treasury of the Lake Shore Company has been and will, unless enjoined by this court, be unlawfully depleted through the carrying out of said contract with the Read Committee and through the purchase by the Lake Shore Company, contrary to law, of its own capital stock.

25 Plaintiff says that said proposed consolidation of the Lake Shore Company with the New York Central Company, constituting as it will a consolidation of companies owning and controlling several parallel and competing lines engaged in commerce, both inter and intra-state, and with foreign nations, is a violation of the public policies of the United States and of the states of Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York, and of the common law of those states; a violation of the Federal so-called Sherman Anti-trust Act and the Clayton Act so-called (said last named act being an act of Congress approved October 15, 1914) and other Federal laws; a violation of the Constitutions of Illinois, Michigan and Pennsylvania; and a violation of the various laws of the United States and of said states aforesaid providing against and making illegal, consolidations of, and the control of, parallel and competing lines of railroad, and all combinations in restraint of trade and commerce through mergers, stock ownership, or unified control, accomplished in such or other ways, and establishing penalties and forfeitures therefor.

Plaintiff says that unless restrained by order of this Honorable Court, the New York Central Company will at the company meeting of stockholders of the Lake Shore Company above referred to, endeavor to vote said Lake Shore stock so owned by it in favor of such proposed illegal consolidation; that the New York Central Company holding as it does said stock constituting the control of the Lake Shore Company, in violation of law as above set forth, and in restraint of trade and commerce contrary to the provisions of said laws, such voting is and will be unlawful and unauthorized; that if such meeting be held, and there said consolidation agreement be ratified and approved, there will result inextricable confusion from

the illegal and unlawful merging of the affairs and property, management and control, of said defendant companies, and a multiplicity of suits will be requisite in order to undo the same; that thereby, under said laws, constitutions and statutes aforesaid, penalties and forfeitures will arise and take place against said defendant railroad companies and their respective properties.

Plaintiff further says that if defendant, the Lake Shore Company, continues in the future its illegal holding of the controlling stock interests of the Nickel Plate Company, the Big Four Company, the Lake Erie Company and the Ohio Central Company herein-
26 before referred to, not only will inter and intra-state trade and commerce be restrained and competition suppressed, but its property and its corporate entity will thereby be subjected under said statutes, laws and constitutions aforesaid to penalties and forfeitures. Plaintiff has no adequate remedy at law for the redress of the wrongs above set forth.

Wherefore, plaintiff prays:

1st. That the New York Central Company, its officers, agents, directors, proxies, and attorneys and each and all of them, be enjoined from voting, or causing to be voted, the stock of the Lake Shore Company so held by the New York Central Company at any meeting of the stockholders of the Lake Shore Company in favor of said consolidation agreement, or in any other way, to any other extent, or for any other purpose whatsoever.

2nd. That an injunction may be issued restraining and preventing the Lake Shore Company, its officers, agents, directors and stockholders from, directly or indirectly, in any way whatsoever, entering into, or permitting to be entered into, or consummating, or permitting to be consummated, the consolidation agreement above referred to, and the consolidation evidenced thereby and contemplated therein; that said the Lake Shore Company, its officers, agents, stockholders and directors, and any and all tellers or inspectors at any stockholders' meeting appointed, be enjoined and restrained from at any meeting of the stockholders of the Lake Shore Company receiving or counting, or permitting to be voted, directly or indirectly, in any way, the said stock of the Lake Shore Company so held as above set forth by the New York Central Company.

3rd. That the Lake Shore Company be enjoined from making any consolidation whatsoever with the New York Central Company unless and until it shall first have been divested of its control of the Big Four, the Nickel Plate, the Lake Erie, and the Ohio Central Companies, and until the New York Central Company shall have been divested of the control of the Michigan Central Company and that of the Western Transit Company.

4th. That the Lake Shore Company, its officers, agents and employees be all and each of them enjoined from carrying out the provisions of said contract between the Lake Shore Company and the Read Committee above set forth, and from paying out any monies

27 thereunder and from purchasing any stock of the Lake Shore Company, not only the stock referred to in said contract with the Read Committee aforesaid, but also any and all other stock of said company; that if any such stock has so already been acquired, or be acquired during the pendency of this cause, such acquisition be decreed illegal and null and void.

5th. That pending this suit, separate receivers be appointed to take charge and possession of the stocks of the Nickel Plate Company, the Lake Erie Company, the Ohio Central Company, the Indiana Southern Company, and the Big Four Company, above set forth to be owned by the Lake Shore Company, and that upon final hearing this court either cause said stocks, and the controls of said companies represented by said stocks, to be placed in the hands of suitable, independent, competitive trustees, or else order the same to be sold, or make such other order with reference to the same as will insure their independent and competitive lawful handling and management in the future.

6th. That a receiver be appointed to take charge of, pending this suit, the equity of the New York Central Company in said stock of the Lake Shore Company so above set forth to be owned by it, and that upon final hearing the court place said equity in the hands of independent trustees, segregated from direct or indirect connection with the interests of the New York Central Company, who will, through the trust so created, handle, manage, vote and control said stock in the interest solely of the Lake Shore Company itself, and in such manner and way as to provide for free and uninterrupted competition on its part with any or all other transportation lines whatsoever.

7th. That the New York Central Company, its officers and agents, be enjoined from issuing any of said consolidation 4 per cent bonds in exchange for such Lake Shore collateral 3½ per cent bonds whose holders have accepted or may accept the offer for such exchange above referred to.

8. That if, pending this action, such consolidation be effected, the same be set aside.

9th. Plaintiff prays that a temporary restraining order may be issued granting to plaintiff the injunctive relief above set forth pendente lite; that upon final hearing such restraining order may be made perpetual; and that plaintiff may be granted the further and other relief to which it may be entitled, in equity and good conscience. Henry, Fauver, McGraw & Thomseen, Attorneys for Plaintiff.

28 STATE OF OHIO,
Cuyahoga County, ss:

Personally appeared before me, a Notary Public in and for said County and State, Clarence H. Venner, who being first duly sworn, said that he is the president of the General Investment Company,

plaintiff in the above entitled action; that he has read the foregoing petition, and that the allegations therein contained are true.

C. H. VENNER.

Sworn to before me and subscribed in my presence this 8th day of December, 1914.

HARRISON B. McGRAW,
Notary Public. [SEAL.]

STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

GENERAL INVESTMENT COMPANY, Plaintiff,

VS.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,
Central Trust Company of New York, New York Central and
Hudson River Railroad Company, and William A. Read, Henry
Evans and Willis D. Wood, Defendants.

Precipe for Summons and Order of Injunction.

To the clerk:

Please issue summonses for the defendants in the above entitled action, and also writs of injunction therein. Endorse: Action for Injunction and Equitable Relief. Serve summons on defendant, The Lake Shore and Michigan Southern Railway Company at its general office, Cleveland, Ohio, and on the New York Central and Hudson River Railroad Company at its office, Hippodrome Building, Cleveland, Ohio.

HENRY, FAUVER, McGRAW &
THOMPSEN,
Attorneys for Plaintiff.

Said petition is endorsed as follows, to-wit: No. 142,107, State of Ohio, Cuyahoga County, ss. In the Common Pleas Court. General Investment Company, Plaintiff, vs. The Lake Shore and Michigan Southern Railway Company, et al., Defendants. Petition for Injunction and Equitable Relief, and precipe. Henry, Fauver, McGraw & Thomsen.

And thereupon on the 8th day of December, A. D. 1914, there was duly issued from said Court of Common Pleas a certain summons in this cause to the Sheriff of Cuyahoga County, which is in the words and figures following, to-wit:

Summons Issued.

THE STATE OF OHIO,
Cuyahoga County, as:

To the Sheriff of Cuyahoga County:

You are commanded to notify The Lake Shore and Michigan Southern Railway Co., The New York Central and Hudson River Railroad Co. that they have been sued by General Investment Company in the Court of Common Pleas of Cuyahoga County, and that unless they answer by the 9th day of January, A. D. 1915, 29 the petition of the said plaintiff against them filed in the Clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 21st day of December, A. D. 1914.

Witness, Edmund B. Haserodt, Clerk of said Court, and the seal thereof, at the city of Cleveland, this 8th day of December, A. D. 1914.

EDMUND B. HASERODT,
Clerk,

By H. L. NICHOLAS,
Deputy Clerk. [SEAL.]

Said summons is endorsed as follows, to-wit: No. 142,107, Cuyahoga Common Pleas. General Investment Co. vs. The L. S. & M. S. Ry. Co. et al. Summons in action for Injunction & Eq. Relief. Returnable Dec. 21, 1914. Henry, Fauver, McGraw & Thomsen, Plaintiff's Attorneys.

Summons Returned.

And thereupon on the 11th day of December, A. D. 1914, came the sheriff of Cuyahoga County, who duly returned and filed said summons with his return thereon, endorsed as follows, to wit:

THE STATE OF OHIO,
Cuyahoga County, as:

On the 9th day of December, 1914, I served this writ on the within named, The Lake Shore and Michigan Southern Railway Company, by delivering a true and certified copy thereof, with all the endorsements thereon to D. C. Moon, General Manager in charge of the business of said company, the president or other officer not found in my county, also on the same day on The New York Central and Hudson River Railroad Company, by delivering a like copy thereof to W. A. Barr, Regular Ticket Agent, in charge of the business of said company, the president or other officer not found in my county.

W. J. SMITH,

Sheriff,

By E. H. STEGKEMPER,

Deputy.

Sheriff's fees \$1.16.

Motion.

And thereupon on the 11th day of December, A. D. 1914, there was duly filed in said Court of Common Pleas a certain motion in this cause which is in the words and figures following, to-wit:

In the Court of Common Pleas of Cuyahoga County, Ohio.

GENERAL INVESTMENT COMPANY, Plaintiff,

vs.

**THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY et al.,
Defendants.**

No. 142,107.

Motion.

Now comes The New York Central & Hudson River Railroad Company and not intending hereby to enter its appearance, but appearing solely for the purposes of this motion, moves that the Sheriff's return of service of summons upon it be set aside, for that the said W. A. Barr is not nor was he at the time of said pretended service its regular ticket agent, managing agent, or other officer, agent or employe upon whom service of summons could lawfully be made; and said attempted service is void.

30 **THE NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY,**
By C. T. LEWIS,
Its Attorney.

To the Plaintiff and its Attorneys:

Take notice that on Monday, December 14, 1914, at nine o'clock A. M. or as soon thereafter as counsel can be heard, The New York Central & Hudson River Railroad Company will present the above motion for hearing to said court in Room No. One at the Court House, Cleveland Ohio, or such other room, wherein Hon. Frank E. Stevens may then be holding court.

C. T. LEWIS,
Attorney for said Defendant.

Service of the above motion and notice acknowledged this 11th day of December, A. D. 1914.

HENRY, FAUVER, McGRAW & THOMSEN,
Attorneys for Plaintiff.

Said motion is endorsed as follows, to-wit: Common Pleas Court, Cuyahoga County, Ohio, No. 142,107. General Investment Co., Plaintiff, vs. Lake Shore & Michigan Sou. Ry. Co. et al., Defendants. Motion 68236-A. By C. T. Lewis, Attorney.

Notice.

And thereupon on the 12th day of December, A. D. 1914, there was duly filed in said Court of Common Pleas a certain notice in this cause, which is in the words and figures following, to-wit:

In the Court of Common Pleas of Cuyahoga County, Ohio.

GENERAL INVESTMENT COMPANY, Plaintiff,

vs.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,
Central Trust Company of New York, New York Central and Hudson River Railroad Company and William A. Read, Henry Evans and Willis D. Wood, Defendants.

No. 142,107.

Notice.

To General Investment Company and Henry, Fauver, McGraw & Thomsen, its attorneys:

You are hereby notified that the New York Central & Hudson River Railroad Company has filed its motion in the above entitled action, to set aside the sheriff's return of the service of summons upon it therein, and that said motion will be heard by said court on December 14, 1914, at 9 o'clock A. M., or as soon thereafter as counsel can be heard, in Room No. 1 (or such other room wherein the Hon. Frank E. Stevens may then be holding court), at the court house in Cleveland, Ohio. Affidavits will be used on such hearing.

THE NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY,
By CHAS. T. LEWIS,
Its Attorney.

Service of the above notice by copy thereof is hereby acknowledged this 12th day of December, 1914.

HENRY, FAUVER, McGRAW & THOMSEN,
Attorneys for Plaintiff.

31 Said notice is endorsed as follows: Common Pleas Court, Cuyahoga County, Ohio. No. 142,107. General Investment Co., Plaintiff, vs. The Lake Shore & Michigan Southern Ry. Co. et al. Defendant's Notice. By Chas. T. Lewis, Attorney for The New York Central & Hudson River Railroad Co.

Motion.

And thereupon on the 12th day of December, A. D. 1914, there was duly filed in said Court of Common Pleas a certain motion for temporary Injunction in this cause, which is in the words and figures following, to-wit:

No. 142,107.

STATE OF OHIO,
Cuyahoga County, ss:

In the Common Pleas Court.

GENERAL INVESTMENT COMPANY, Plaintiff,

vs.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY
et al., Defendants.

Motion for Temporary Injunction.

Now comes the plaintiff and moves the court for a temporary injunction pendente lite, as prayed for in the petition herein.

HENRY, FAUVER, McGRAW & THOMSEN,
Attorneys for Plaintiff.

Said motion is endorsed as follows, to-wit: No. 142,107. State of Ohio, Cuyahoga County, ss. In the Common Pleas Court. General Investment Company, Plaintiff, vs. The Lake Shore and Michigan Southern Railway Company, et al., Defendants. 68,236. Motion for Temporary Injunction. Henry, Fauver, McGraw & Thomsen, Attorneys.

Jour. 197, Page 799.

And thereupon on this the 15th day of December, A. D. 1914, being a day of the September Term, A. D. 1914, of said Court, there was duly entered upon the journal the following order, to-wit:

Jour. 197, Page 848.

Dec. 15th, 1914.

The Motion of the defendant, The New York Central and Hudson River Railroad Company, to quash the service of summons herein, is heard and overruled, to which said defendant excepts.

December 21, 1914.

And thereupon on this, the 21st day of December, A. D. 1914, being a day of the September Term, A. D. 1914, of said Court there was duly entered upon the Journal the following order, to-wit: The motion by the plaintiff for temporary injunction, is heard and overruled. To which plaintiff excepts.

Affidavit of Charles F. Daly.

And thereupon on the 8th day of January, A. D. 1915, there was duly filed in said Court of Common Pleas a certain Affidavit in this cause which is in the words and figures following, to-wit:

In the Court of Common Pleas of Cuyahoga County, Ohio.

No. 142,107.

GENERAL INVESTMENT COMPANY, Plaintiff,
vs.

32 THE LAKE SHORE & MICHIGAN SOUTHERN RY. CO. et al.,
Defendants.

Affidavit.

STATE OF NEW YORK,
County of New York, ss:

Before me the undersigned, a notary public in and for said county, personally appeared Charles F. Daly, who being first duly sworn, deposes and says: I reside in the city of New York, New York, and am and for more than a year last past have been the Vice-President of the New York Central & Hudson River Railroad Company, named as defendant in the above entitled cause. Said railroad company is a corporation organized under the laws of the State of New York, and is not a citizen or resident of the State of Ohio, and has no managing agent within said state. Its lines of railroad do not enter said State of Ohio; and it has therein no chairman or president of its board of directors or other chief officer; nor any cashier, treasurer, secretary, clerk, ticket or freight agent; nor has it within said state any office or place of business. I further depose that W. A. Barr of Cleveland, Ohio, is not and never was an officer, managing agent, regular ticket agent, ticket agent, agent, employe or representative of said New York Central & Hudson River Railroad Company, or authorized to accept service of process against said company in the state of Ohio. And further deponent saith not.

C. F. DALY.

Sworn to and subscribed by the said Charles F. Daly before me and in my presence this 11th day of December, 1914.

[SEAL.]

J. M. WOOLDRIDGE,

Notary Public.

Notary Public, Westchester County.

Certificates filed in New York & Bronx Counties.

N. Y. County No. 81.

N. Y. Register No. 6155.

Bronx County No. 10.

Bronx Register No. 630.

Attached hereto appears the following:

STATE OF NEW YORK,
County of New York, ss:

No. 24,799.

I, William F. Schneider, Clerk of the County of New York and also Clerk of the Supreme Court for the said County, the same being a court of record, do hereby certify that J. M. Wooldridge has filed in the clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the county of Westchester with his autograph signature, and was at the time of taking the annexed deposition duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and believe that the signature to the annexed certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said court and county the 11th day of Dec., 1914.

[SEAL.]

WM. F. SCHNEIDER,
Clerk.

(10 cts. Internal Revenue Stamp Cancelled.)
C. C. O., Dec. 11, 1914, New York.

33 Said affidavit is endorsed as follows to-wit: Common Pleas Court, Cuyahoga County, Ohio, No. 142,107. General Investment Co., Plaintiff, vs. The Lake Shore & Michigan Southern Ry. Co. et al., Defendants. Affidavit of C. F. Daly.

And thereupon on the 8th day of January, A. D. 1915, there was duly filed in said Court of Common Pleas a certain affidavit in this cause which is in the words and figures following, to-wit:

Affidavit of C. K. Fauver.

STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

GENERAL INVESTMENT COMPANY, Plaintiff,

vs.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY
et al., Defendants.

Affidavit of C. K. Fauver.

STATE OF OHIO,
Cuyahoga County, ss:

C. K. Fauver, being first duly sworn, says that on Saturday, the 12th day of December, 1914, at 2:45 p. m. he purchased the ticket

attached hereto at the ticket office of the New York Central Lines situated in the Hippodrome Building, Cleveland, Ohio, and paid therefore the sum of \$6.03.

C. K. FAUVER.

Sworn to before me and subscribed in my presence this 12th day of December, 1914.

[SEAL.]

M. L. THOMSEN,
Notary Public.

Attached hereto appears the following: New York Central & Hudson Riv. R. R. Non-Transferable ticket. Good for one first class passage. Buffalo, N. Y., to Rochester, N. Y. When stamped and sold by an authorized agent at the lawful fare subject to the following contract between the purchaser and all the lines over which it reads: A. Limit. This ticket is good for continuous passage within one day from date of sale as indicated by stamp of agent on back hereof. B. Stop-overs will be subject to tariff regulations. C. "Baggage valuation is limited to One Hundred Dollars for an adult and Fifty Dollars for a child (except between points wholly within the State of New York) unless purchaser hereof declares a greater valuation at time baggage is presented for transportation and pays excess valuation charges according to tariff rates and regulations." "Between points wholly within the State of New York, baggage liability is fixed by law at One Hundred and Fifty Dollars, unless a greater valuation is declared at time of checking, in which case, a written receipt stating the value must be issued by the agent who will make additional collection in accordance with lawfully published and filed tariffs." The right is reserved to each line over which this ticket reads to check baggage to final destination 34 only. Only a limited amount of baggage can be handled on certain trains and whatever baggage cannot be handled on the train which may be used by purchaser of this ticket will be forwarded on next possible train. D. Responsibility, in selling this ticket for passage over other lines and in checking baggage on it this company acts only as agent and is not responsible beyond its own line. Con. A. Form 6 N 6. L. A. Robison, General Passenger Agent. Q. 7282. Issued by the Lake Shore and Michigan Southern Railway Company. Via L. S. & M. S., N. Y. C. & H. R. Lake Shore & Michigan Sou. Ry. Cleveland to Buffalo, N. Y. Subject to conditions of contract. Form 6 N 6. This coupon not good if detached. 1st Class. Q. 7282. Destination, Rochester, N. Y. Issued by the Lake Shore and Michigan Southern Railway Company. Via L. S. & M. S., N. Y. C. & H. R. Said ticket is endorsed as follows to-wit: New York Central lines, Dec. 14, '14. City Ticket Office, Cleveland, O. B. New York Central Lines, Dec. 14, '14. City Ticket Office, B. Cleveland, O. B.

Said affidavit is endorsed as follows to-wit: No. 142107. State of Ohio, Cuyahoga County, as. In the Common Pleas Court. General Investment Company, Plaintiff, vs. The Lake Shore and Michigan Southern Railway Company et al., Defendants. Affidavit of C. K. Fauver. Henry, Fauver, McGraw & Thomsen, Attorneys.

Affidavit of W. A. Barr.

And thereupon on the 8th day of January, A. D. 1915, there was duly filed in said Court of Common Pleas a certain affidavit in this cause which is in the words and figures following to-wit:

In the Court of Common Pleas of Cuyahoga County, Ohio.

No. 142,107.

GENERAL INVESTMENT COMPANY, Plaintiff,

vs.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY et al.,
Defendants.

Affidavit.

STATE OF OHIO,
Cuyahoga, County, ss:

Before me, the undersigned, a notary public within and for said county and State, personally appeared W. A. Barr, who being first duly sworn, deposes as follows: I am the W. A. Barr mentioned in the sheriff's return of the summons herein, and for more than three years last past have been City Ticket Agent for The Lake Shore & Michigan Southern Railway Company, defendant in the above cause, and The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, my office of which I have at all times been in charge, being located in the Hippodrome Building in Cleveland in said county. I am not and have not at any time during said period been an officer, cashier, treasurer, secretary, clerk or managing agent, ticket 35 or freight agent, regular ticket agent, agent or employe of, or in any manner connected with or employed by the New York Central & Hudson River Railroad Company named as defendant in the above cause; nor has said last mentioned company during that time had its place of business at my said office. And further deponent saith not.

W. A. BARR.

Sworn to before me and subscribed in my presence by the said W. A. Barr this 12th day of December, A. D. 1914.

[SEAL.]

C. R. GAULT,
Notary Public.

Said affidavit is endorsed as follows to-wit: No. 142,107. Common Pleas Court of Cuyahoga County, Ohio. General Investment Company, Plaintiff, vs. The Lake Shore and Michigan Southern Railway Company et al., Defendants. Affidavit of W. A. Barr.

And thereupon on this 8th day of January, A. D. 1915, there was duly filed in said Court of Common Pleas a certain petition for removal in this cause which is in the words and figures following, to-wit:

Petition for Removal.

In the Court of Common Pleas of Cuyahoga County, Ohio.

GENERAL INVESTMENT COMPANY, Plaintiff,

vs.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
Central Trust Company of New York, New York Central & Hudson River Railroad Company, William A. Read, Henry Evans and Willis D. Wood, Defendants.

Petition for Removal to the Federal Court.

Your petitioners, The Lake Shore & Michigan Southern Railway Company, The New York Central and Hudson River Railroad Company and The New York Central Railroad Company, appearing for the purpose of this petition only, and not intending to waive any question of the sufficiency of service or the want of service on them or either of them, but expressly reserving all question of service, jurisdiction and want of service on them or either of them, respectfully show to this Honorable Court that the matter and amount involved in the controversy herein, exceeds, exclusive of interest and costs, the sum or value of Five Thousand Dollars, that the suit is one of a civil nature in equity and the controversies herein, as appears from the plaintiff's petition, arise under the constitution and laws of the United States; that plaintiff's petition herein alleges that the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Maine, and

Your petitioners aver that such was at the beginning of this suit and is now the fact; that The Lake Shore & Michigan Southern Railway Company is a consolidated railroad corporation under the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois; that The New York Central & Hudson River Railroad Company is a railroad corporation organized and existing under the laws of the State of New York; that each of your petitioners herein is an interstate railroad engaged in commerce between the states, and that all of the railroad corporations referred to in the petition, are also railroad companies engaged in interstate commerce; that the railroad of The Lake Shore & Michigan Southern Railway Company and The New York Central & Hudson River Railroad Company connect at Buffalo, in the State of New York, and form a connected and continuous line of railroad from the city of New York in the State of New York, to the city of Chicago, in the State of Illinois, and that each of them have been and are now largely and continuously engaged in the transportation of interstate traffic.

Your petitioners allege that the controversy herein arises from the following alleged facts; that The Lake Shore & Michigan Southern Railway Company and The New York Central & Hudson River Railroad Company, petitioners herein, contemplate a consolidation under the consolidation statutes of the several states through or into which their respective railroads run, of their two lines of railroads; that the plaintiff is the owner of five shares of the capital stock of the said The Lake Shore & Michigan Southern Railway Company, which it has owned since the 27th of June, 1914, and is the owner of three hundred shares of the capital stock of The New York Central & Hudson River Railroad Company, which it alleges it has owned since February 24th, 1914; that the acquisition by The New York Central & Hudson River Railroad Company of a very large majority of all of the outstanding capital stock of The Lake Shore & Michigan Southern Railway Company gives to The New York Central & Hudson River Railroad Company the control of The Lake Shore & Michigan Southern Railway Company; that such acquisition and its continued holding, is in violation of the common law and of the Anti-Trust acts of the United States, especially the act known as the Sherman Act passed July 2nd, 1890; that each of said railroads and their constituent companies are largely engaged in interstate commerce; that the acts complained of in the petition, contemplated or committed by your petitioners, are in pursuance of an illegal plan

37 to suppress and restrain interstate commerce, and that the proposed consolidation of said two companies would constitute a consolidation in violation of the public policies of the United States, in violation of the Act of Congress passed July 2nd, 1890, and in violation of the Act of Congress approved October 15, 1914, and in violation of other laws of the United States; that said action is brought for the purpose of preventing the proposed consolidation and to that end to prevent the voting of the stock of the said The Lake Shore & Michigan Southern Railway Company in favor of such consolidation, and to enjoin The Lake Shore & Michigan Southern Railway Company from entering into or permitting said consolidation to be consummated, and from receiving or counting any votes of its stockholders in favor thereof, and to enjoin The New York Central & Hudson River Railroad Company, its officers and agents, from voting or causing to be voted any stock of The Lake Shore & Michigan Southern Railway Company in favor of such consolidation.

Your petitioners further aver that the New York Central Railroad Company is now and has been since the 28th day of December, 1914, a consolidated railroad corporation, created and existing under the laws of the states of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, and includes in such consolidation both the aforesaid The Lake Shore & Michigan Southern Railway Company and The New York Central and Hudson River Railroad Company; that the agreement or articles of consolidation constituting the said the New York Central Railroad Company, were duly adopted, ratified and approved by the Boards of Directors of said several companies and by the stockholders thereof, as provided by the laws of said

several states, and were duly filed with the proper officers of said states through or into which said consolidated railroad company passes on the 22nd day of December, 1914; that the first meeting of the Board of Directors of said consolidated company was held on the 28th day of December, 1914, and that all other acts necessary or precedent to the complete consolidation of said companies, *has been* duly performed.

And your petitioners further aver that this suit is a suit of a civil nature in equity arising under the constitution and laws of the United States, of which the District Courts of the United States are given original jurisdiction by an Act of Congress entitled "An Act to codify, revise and amend the laws relating to the judiciary," approved

March 3, 1911, and as such is removable under said act and 38 that this suit arises under the laws of the United States because it is a suit to restrain the consolidation aforesaid and to set it aside if effected upon the ground, among others, that it would be in violation of the Act of Congress passed July 2, 1890, called the Sherman Anti-Trust act and of the act of Congress approved October 15, 1914, called the Clayton act, and involves the construction and interpretation of said Federal statutes concerning which there are substantial and actual disputes and controversies upon which the final determination of the case depends.

And your petitioners also aver that not only is the construction of said Federal statutes involved and made necessary by the allegations in the petition that said consolidation would violate their provisions, but the same is also required by the averments that said consolidation would violate the state constitutional and statutory provisions referred to in the petition, the scope of and application of which are dependent upon the construction and interpretation of the aforesaid Federal statutes.

Your petitioners further aver that your petitioners are alone interested in the controversy with the plaintiff as to the proposed consolidation, and are alone interested in the question as to whether such consolidation would be in violation of the laws of the United States, and on the question of the construction of the laws of the United States, and that such questions are separable from any other question or questions attempted to be made in said petition, and can be fully determined as between your petitioners and plaintiff, without reference to any other matters alleged in said petition or in the prayer thereof.

Your petitioners aver that Central Trust Company of New York was at the time of the bringing of this suit and is now a corporation organized under the laws of the state of New York; that William A. Read, Henry Evans and Willis D. Wood were at the time of the bringing of this suit and are now, citizens of the state of New York; that while said Central Trust Company of New York, William A. Read, Henry Evans and Willis D. Wood are named in the caption of said petition as defendants, no issue is made in said petition as to them, nor is any relief against them or either of them prayed for in said petition; that no preceipe or summons against them or either of them has been filed in this suit, and no attempt has

been made to make them or either of them actual defendants herein.

39 Your petitioners aver that neither of said last four named defendants are either necessary or proper parties to the question of the validity of the proposed consolidation, or whether the same is in violation of the constitution or laws of the United States, and an examination of the petition will disclose that the said four defendants are not, nor is either of them, involved in or interested in the separable controversy between your petitioners and said plaintiff, and that they are not in fact defendants and are not made such by any averment in said petition.

Your petitioners aver that it appears from the petition of plaintiff herein, that the three individuals named as defendants herein, acting on behalf of themselves and various other holders of stock of The Lake Shore & Michigan Southern Railway Company, instituted or caused to be instituted certain litigation, wherein they sought to prevent said consolidation, and that thereafter their controversy was settled upon the terms stated in said petition and the litigation instituted by them was dismissed, and the conditions thereof, so far as the same appears from said petition, have now been fully complied with.

Your petitioners further aver that if under any circumstances the said Central Trust Company, William A. Read, Henry Evans and Willis D. Wood should be held to be defendants herein, then the only matter in which they could be in anywise interested, would be as to the performance of such parts of the contract referred to in the petition, as between said three individual defendants and The Lake Shore & Michigan Southern Railway Company, which has not been fully performed and which said controversy could not in any manner affect the separable nature of the controversy between your petitioners and said plaintiff.

Your petitioners repeat the allegation that no relief is prayed for against said Central Trust Company or any of the individual defendants aforesaid, and further aver that their presence is not necessary to the complete determination of the controversy shown in the petition; but that if their presence is essential to the determination of any part of said controversy, then that such part in which they are interested, constitutes a controversy distinct and separate from that which arises under the constitution and laws of the United States as aforesaid, and which your petitioners are entitled to remove.

40 Your petitioners further show that the petition of the plaintiff herein was filed in the Court of Common Pleas of Cuyahoga County, Ohio, on the 8th day of December, 1914, and that this petition and bond is filed before the defendants or either of them are required by the laws of Ohio or any rule of the Common Pleas Court to answer or plead to plaintiff's petition.

Your petitioners desire to remove said cause to the United States District Court, for the Northern District of Ohio, Eastern Division, and hereby and herewith offer a good and sufficient bond with proper surety for their entering into the said District Court of the

United States, for the Northern District of Ohio, Eastern Division, a copy of the record herein, within thirty days from the filing of this petition for removal and for the paying of all costs that may be awarded by said District Court, if said court shall hold that this suit was wrongfully and improperly removed, and presents this its verified petition for such removal.

Your petitioners pray this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and cause the record herein to be removed into said District Court of the United States in and for said Northern District of Ohio, Eastern Division.

THE LAKE SHORE & MICHIGAN SOUTHERN
RAILWAY COMPANY,

By WALTER C. NOYES,
S. H. WEST,

Its Attorneys.

THE NEW YORK CENTRAL & HUDSON RIVER
RAILROAD COMPANY,

By CHAS. T. LEWIS,
Its Attorney.

THE NEW YORK CENTRAL RAILROAD, COM-
PANY,

By F. J. JEROME,
Its Attorney.

STATE OF OHIO,
Cuyahoga County, ss:

D. C. Moon, being duly sworn, says that he was, before its consolidation with The New York Central Railroad Company, General Manager of The Lake Shore & Michigan Southern Railway Company, and is now the like agent and representative of said company, duly authorized, as to the matters of said Company undisposed of, and that he is the General Manager of The New York Central Railroad Company, and that the facts stated and allegations in the foregoing petition for removal are true as he believes.

D. C. MOON.

Subscribed by the said D. C. Moon in my presence and sworn to by him before me this 8th day of January, 1915.

HARRY E. KING,
Notary Public, Cuyahoga County, Ohio. [SEAL.]

Said petition for removal is endorsed as follows to-wit: In the Court of Common Pleas, Cuyahoga County, Ohio. No. 142107. General Investment Company, Plaintiff vs. The Lake Shore & Michigan Southern Railway Company, Central Trust Company of New York, New York Central & Hudson River Railroad Company, William A. Read, Henry Evans and Willis D. Wood, Defendants. Petition for removal to the Federal Court, Doyle & Lewis, Toledo.

Notice.

And thereupon on the 8th day of January, A. D. 1915, there was duly filed in said Court of Common Pleas a certain notice in this cause which is in the words and figures following to-wit:

In the Court of Common Pleas of Cuyahoga County, Ohio.

GENERAL INVESTMENT COMPANY, Plaintiff,

VS.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
Central Trust Company of New York, The New York Central &
Hudson River Railroad Company, William A. Read, Henry
Evans, and Willis D. Wood, Defendants.

Notice.

The plaintiff will take notice that the defendants, The Lake Shore & Michigan Southern Railway Company, The New York Central & Hudson River Railroad Company and The New York Central Railway Company have prepared a petition and bond for the removal of this cause to the District Court of the United States, for the Northern District of Ohio, Eastern Division, which petition and bond said above named defendants will file herein and present to said Court of Common Pleas in which this action is pending, on the 8th day of January, 1915, at 1:15 P. M.

CHAS. T. LEWIS,
S. H. WEST,

Attorneys for L. S. & M. S. Ry. Co. and Others.

A copy of the above notice has this day been received by the undersigned, counsel for the plaintiff.

HENRY, FAUVER, McGRAW &
THOMSEN,

Attorneys for Plaintiff.

Said notice is endorsed as follows, to-wit: No. 142,107.

Bond for Removal.

And thereupon on the 8th day of January, A. D. 1915, there was duly filed in said Court of Common Pleas a certain bond for removal in this case which is in the words and figures following to-wit:

In the Court of Common Pleas of Cuyahoga County, Ohio.

GENERAL INVESTMENT COMPANY, Plaintiff,

vs.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
Central Trust Company of New York, The New York Central &
Hudson River Railroad Company, William A. Read, Henry
Evans, and Willis D. Wood, Defendants.

Bond for Removal.

Know all Men by These Presents: That we, The Lake Shore & Michigan Southern Railway Company, The New York Central & Hudson River Railroad Company, and The New York Central Railroad Company, as principals, and National Surety Company, a corporation of New York, N. Y., as surety, are held and stand firmly bound unto the General Investment Company, the plaintiff in the above entitled case, in the penal sum of one thousand dollars for the payment whereof, well and truly to be made unto the said General Investment Company, its successors, representatives and assigns, we bind ourselves, our heirs, successors, and representatives, firmly by these presents.

Upon consideration, nevertheless, that whereas the said The Lake Shore & Michigan Southern Railway Company, The New York Central & Hudson River Railroad Company, and The New York Central Railroad Company have filed their petition in the Court of Common Pleas of Cuyahoga County, Ohio, for the removal of a certain cause therein pending, wherein the said The General Investment Company is plaintiff and the said The Lake Shore & Michigan Southern Railway Company and The New York Central & Hudson River Railroad Company and others are named as defendants, to the District Court of the United States for the Northern District of Ohio, Eastern Division.

Now, if the said The Lake Shore & Michigan Southern Railway Company, The New York Central & Hudson River Railroad Company and The New York Central Railroad Company shall enter into said District Court of the United States, for the said Northern District of Ohio, Eastern Division, within thirty days from the date of the filing of the petition for such removal, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and virtue.

In witness whereof, the said The Lake Shore & Michigan Southern Railway Company, The New York Central & Hudson River Railroad Company and the New York Central Railroad Company, the

above named principals, and the above named surety, have hereunto set their hands and seals this 8th day of January, 1915.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,

By S. H. WEST, *Genl. Atty.*

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

By CHAS. T. LEWIS.

THE NEW YORK CENTRAL RAILROAD COMPANY,

By F. J. JEROME,

General Counsel.

NATIONAL SURETY COMPANY,

By C. R. LAURENSEN,

Attorney in Fact.

[Seal of National Surety Company, Incorporated.]

43 Said bond for removal is endorsed as follows to-wit: In the Court of Common Pleas, of Cuyahoga County, Ohio. No. 142,107. General Investment Company, plaintiff, vs. The Lake Shore & Michigan Southern Railway Company, Central Trust Company of New York, the New York Central & Hudson River Railroad Company, William A. Read, Henry Evans and Willis D. Wood, Defendants. Bond for removal. Doyle & Lewis, Toledo, Ohio.

Jour. 198, Page 35, Jan. 8, 1915.

And thereupon on this the 8th day of January, A. D. 1915, being a day of the January Term, A. D. 1915, of said court there was duly entered upon the journal the following order to-wit:

The defendants, The Lake Shore & Michigan Southern Railway Company, The New York Central & Hudson River Railroad Company and The New York Central Railroad Company, having filed within the time provided by law their petition for removal of this cause to the District Court of the United States, for the Northern District of Ohio, Eastern Division, and having at the same time offered their bond in the sum of One Thousand Dollars with National Surety Company, good and sufficient surety conditioned according to law, and it being shown to the court that the notice required by law of the filing of said bond and petition had, prior to the filing of said petition, been served upon the plaintiff herein, which notice the court finds was sufficient and in accordance with the requirements of the law, this court does now hereby accept and approve said bond and said petition, and does order this cause to be removed to the District Court of the United States for the Northern District of Ohio, Eastern Division, pursuant to the statute of the United States, and that all other proceedings of this court be stayed. Plaintiff excepts.

Plaintiff's costs in this cause are taxed at \$5.67.

Defendant's costs in this cause are taxed at \$39.80.

THE STATE OF OHIO,
Cuyahoga County, ss:

I, Edmund B. Haserodt, Clerk of the Court to Common Pleas, within and for said County, and in whose custody the files, journals and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the records, Vol. 936, page 498 of the proceedings of the Court of Common Pleas, within and for said Cuyahoga County, and that
44 said foregoing copy has been compared by me, with the original record, Vol. 936, page 498 and that the same is a correct transcript thereof.

In Testimony Whereof, I do hereby subscribe my name officially, and affix the seal of said court at the Court House in the City of Cleveland, in said County, this 22d day of January, A. D. 1915.

EDMUND B. HASERODT,

Clerk.

[SEAL.]

I, Alvin J. Pearson, presiding judge of the Court of Common Pleas, within and for the eleventh judicial district of the State of Ohio, in which district is said County of Cuyahoga, do hereby certify, that Edmund B. Haserodt was at the date of the above certificate, and now is, clerk of said Court of Common Pleas, with and for said Cuyahoga County, and State of Ohio, and that said clerk is the officer in whose custody said original record, Vol. 936, page 498, is required to be kept by the laws of the State of Ohio, and authorized by the laws of the State of Ohio, to certify as aforesaid, and that said attestation to said copy of said record is in due form of law.

Signed by me and dated at Cleveland, Cuyahoga County, Ohio, this 22d day of January, A. D. 1915.

ALVIN J. PEARSON,

Judge as Aforesaid.

I, Edmund B. Haserodt, clerk of the Court of Common Pleas, a court of record of Cuyahoga county, do hereby certify that Alvin J. Pearson was at the date of the foregoing certificate the duly elected, qualified and acting presiding judge of the Court of Common Pleas of Cuyahoga County.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said court, at Cleveland this 22d day of January, A. D. 1915.

EDMUND B. HASERODT,

[SEAL.]

Clerk.

It is agreed between the undersigned that, so far as competent and relevant, the testimony of Messrs. Barr and Robinson, the affidavit of C. K. Fauver, and Exhibits 1 to 7 inclusive, as used in this case in

the hearing before Hon. Frank E. Stevens in the Common Pleas Court of Cuyahoga County, Ohio, may be used herein.

HENRY, FAUVER, McGRAW &
THOMSEN,

Attorneys for General Investment Company.
DOYLE, LEWIS, LEWIS & EMERY,
Attorneys for N. Y. C. & H. R. R. Co.

The plaintiff, further to maintain the issues on its part, called as a witness WILBURT A. BARR, who being first duly sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. What is your name in full, please?

A. Wilbert A. Barr.

— You are the same W. A. Barr whose affidavit has been read in evidence here this morning?

A. I am.

Q. You may state what your occupation is?

A. I am city ticket agent for the L. S. & M. S. Railway Company, The C. C. C. & S. L. Railway Company, that is the Big Four, and also for the Pullman Company, in the sale of Pullman tickets from Cleveland over either of those lines.

Q. How long have you acted in that capacity?

A. Since November 1, 1911.

Q. And your office is where?

A. In the Hippodrome Building at 714 Euclid Avenue.

Q. You have looked at the ticket which is attached to the affidavit of C. K. Fauver, have you?

A. I didn't examine it, I just glanced at it.

Q. (Indicating ticket.) I simply want to ask if that was bought at your office?

A. Yes, that was issued at our office.

Q. Calling your attention to serial number upon the ticket, 7282, will you tell the court what that signifies?

A. That is the consecutive number of all those tickets. They are charged to us according to numbers, and that is just simply to enable us to refer to our records and state what date it was sold and the destination of the ticket.

46 Q. How long have you been selling tickets of that general form, coupon tickets of which that is a sample?

A. They have been sold ever since I have been agent there, of course. The contract that you read may have been changed since to conform to any change that was made in the tariffs under which the tickets were sold.

Q. But coupon tickets containing these clauses good for passage over the New York Central and Hudson River Railroad, have been sold by your office for years?

A. Yes, except that some of those clauses may have been changed as I have said.

Q. But no change has been made since this suit was started during the last ten days?

A. Not to my knowledge.

Q. So at the time you were served with summons in this case for The New York Central and Hudson River Railroad Company, whether the service was good or bad, you were at that time selling tickets like this (indicating)?

A. Yes, sir.

Q. You have seen, I suppose, many thousands of coupon tickets calling for passage over The Lake Shore & Michigan Southern Railway, to Buffalo and thus onward over The New York Central and Hudson River Railroad to various points in New York state?

A. Yes, sir.

Q. And those tickets are received and honored by The Lake Shore and Michigan Southern Railway Company and by The New York Central and Hudson River Railroad Company for passage clear to their stipulated destination?

A. Yes.

Q. Now, you are and have been during all the period that you have mentioned, in chief charge of the ticket office where such tickets have been sold,—I mean, you have been the city ticket agent of The Lake Shore & Michigan Southern Railway Company where these tickets have been sold?

A. Yes, sir.

Q. Can you indicate or tell the court what the expression "New York Central Lines" that is stamped on the back of that ticket and which is also painted upon the door of your office, means?

A. Well, my understanding is that it means or signifies a group of railroad companies or systems, a dozen, or something like that, The Lake Shore and Michigan Southern, the Big Four, or The C. C. C. & St. Louis, each being one of those companies.

Q. And The New York Central and Hudson River is one of the companies that is included in the general designation
47 "New York Central Lines," as you are familiar with it?

A. Yes, sir.

Q. Calling your attention to a number of folders or time tables which may be marked for identification "Plaintiff's Exhibits 1, 2, 3, 4, 5, 6 and 7" respectively, I will ask you whether or not those time tables are such as are kept on file in your office and open to public use?

A. Yes, they are.

Q. You may state whether or not all the railroads whose time tables those documents are, are among the railroads that are included within the expression "New York Central Lines?"

A. Yes, they are, I believe.

Whereupon counsel for plaintiff offered in evidence the time tables referred to and marked for identification "Plaintiff's Exhibits 1, 2, 3, 4, 5, 6 and 7" respectively, in connection with the examination of this witness.

Q. Now, you may state whether or not there are through trains running between Cleveland, or between points west of Cleveland on The Lake Shore and Michigan Southern Railway to a destination in New York City over The New York Central and Hudson River Railroad?

A. Yes, sir.

Q. Those trains have been running for years without breaking bulk, have they, so far, at least, as passenger service is concerned?

A. Yes, I so understand it.

Q. The engines may be changed, but the cars run straight through to New York City?

A. Yes, except at the Lake Shore terminal, that would be at Buffalo, in case of The New York Central. None of our crew go beyond Buffalo.

Q. Now, your equipment on The Lake Shore and Michigan Southern Railway, equipment of rolling stock and other equipment, is commonly marked "New York Central Lines," it is not, today?

A. Yes, always "L. S. & M. S." with "New York Central Lines" also shown on there.

Q. And the same is true of each of these other railroads whose time tables have been put in evidence?

A. So far as I know, it is the same.

Cross-examination of Wilbert A. Barr.

By Judge Lewis:

Q. Mr. Barr, you have been asked about coupon tickets over the Lake Shore and The New York Central and Hudson River Railroad to points on the latter road. I will ask you whether you, as the local ticket agent of the Lake Shore sell coupon tickets on other lines of railroad as well as those which you have designated as belonging to the New York Central Lines?

A. Yes, exactly the same form of ticket and under the same conditions.

Q. Over what roads and to what points?

A. Over all railroads in the country and to all points, unless there is a published fare. We can't sell a ticket to a point unless there is a published fare to that particular point.

Q. Do you have publication showing the points to which you can issue coupon tickets?

A. The passenger tariff itself shows those points, and we sell only to such points.

Q. (Indicating.) I show you a paper here marked "Cleveland Joint Passenger Tariff," and ask you what that is?

A. That is a tariff, as I understand it, used as a matter of convenience. Now, we could sell a ticket to Rochester, for instance,—that point has been mentioned here,—there are a few fares shown in here—"Cleveland to Rochester," on page 72, of \$6.03. This is the first tariff we always refer to in selling a ticket. If Rochester wasn't shown in there, we would use L. S. & M. S. local tariff, showing a fare of \$4.66 to Buffalo, in connection with a basing tariff,

which is also filed with the Interstate Commerce Commission, which is also furnished by the Lake Shore general passenger agent, showing a basic fare of \$1.43 Buffalo to Rochester. If we don't find Rochester or the particular point we want to sell a ticket to in this tariff, we would refer to these other two tariffs and make the fare by using the combination just mentioned. But this tariff governs in all cases. No other combination of fares for tariffs can be used to any destination in the country if the fare is shown in that tariff, except a local point on the Lake Shore or the C. C. C. & St. L.

Q. Can you issue a ticket from Cleveland over all the lines of road and to the point named in this book (indicating)?

A. Yes, we do.

Q. That takes in coupon tickets running to Cuba and the various states of the Union?

A. Yes, it does.

Q. Down in Mexico?

A. The important cities of Mexico, and the same of Canada.

Q. And in making those tickets, the coupons are made for the various railroads over which the journey is made?

A. They are, yes.

49 Q. And all of those coupon tickets are of the same order as the one that you have already examined?

A. They are exactly the same, that is, if it is a one-way ticket. The conditions are different on a round-trip ticket, or maybe some special occasion like a convention or something of that nature.

The book entitled "Cleveland Joint Passenger Tariff" referred to by counsel was marked for identification "Defendants' Exhibit A."

Q. (Indicating.) I want to show you here a ticket marked "Cleveland, Ohio, to New York, New York," and another that is apparently "Cleveland to Buffalo," and another that is marked "Good for one passage to San Francisco, California," which are marked for identification "Defendants' Exhibits B, C and D" respectively. Now, I want to call your attention to the one that is marked "Exhibit D;" I will ask you if that is the usual form in which coupon tickets are used by you over the New York Central lines and over other lines in the United States and elsewhere for which you use coupon tickets?

A. It is for one way business.

Q. For one way business?

A. Yes, sir.

— Now, I show you the one marked "Exhibit C," purporting to be a coupon ticket from Cleveland to New York, and ask you if that is the usual form (indicating)?

A. That is the regular form of ticket, yes.

Q. And I show you "Exhibit B," coupon ticket from Cleveland to Buffalo, with another coupon on it—what kind of a ticket is that (indicating)?

A. That is an inter-line ticket similar to the ones I just looked at, except in this the destination is left blank. You could fill in any destination on that ticket and make it to read to any point on

the New York Central and Hudson River Railroad. There is one coupon L. S. & M. S. Railway to Buffalo, New York Central and Hudson River Railroad, Buffalo to whatever destination we stamp or write in the ticket.

Q. By whom were you employed to sell tickets, Mr. Barr?

A. L. A. Robinson, the general passenger agent of the Lake Shore.

Q. Have you any contract of employment of any kind with The New York Central and Hudson River Railroad Company?

A. No, sir, I have not.

Q. Do you make any reports to them directly?

A. None of any kind.

50 Redirect examination of Wilbert A. Barr.

By Judge Henry:

Whereupon counsel for plaintiff offered in evidence in connection with the testimony of this witness the tickets which have been marked for identification "Defendants' Exhibits B, C and D" respectively.

Q. Mr. Barr, you may tell the court whether or not all your one-way tickets issued from your office good for passage over The Lake Shore and Michigan Southern Railway to Buffalo, with coupon attached good for transportation over The New York Central and Hudson River Railroad to some point in New York state, have the words at the top of the ticket as in case of the exhibit attached to C. K. Fauver's affidavit, "New York Central and Hudson River Railroad?"

A. That is a new form of ticket, this ticket here (indicating) reading "To Rochester, New York," which doesn't have a separate coupon reading "Buffalo to destination." The coupon and contract are all in one there. You call attention to the fact that those three tickets, "Exhibit B, C and D" have "L. S. & M. S. Railway Company" at the top of them. This ticket reading "Rochester, New York" to which you refer, has exactly the same printed matter in the same form at the bottom of the part which is a combination of contract and coupon. The words "New York Central and Hudson River" is at the top of this contract and coupon; it is also at the top of the other tickets or part of the ticket, which is a coupon only.

Q. So that in the case of one-way tickets to the points on the New York Central and Hudson River Railroad from Cleveland, Ohio, you are now supplied with forms that do not require to have the name of the destination written in?

A. Oh, yes, they do.

Q. Well, that ticket does not, for example, "Rochester, New York," at the top?

A. It doesn't have the destination of the ticket.

Q. I mean written in; it is printed in?

A. Oh, yes, I misunderstood you. The destination must be shown.

Q. Now, is it true in regard to all the tickets that you are now selling that are good from Cleveland, Ohio, to some point upon The New York Central and Hudson River Railroad, that they are printed according to the new form that you have referred to, a copy of which is attached to the Fauver affidavit?

A. What we call the new stock of tickets are being printed that way; we replaced the old stock referred to here, as they are being sold out, with the new supply of tickets furnished us.

51. Q. Now, excepting over the New York Central Lines, is any form issued from your office that has the name of any other railroad printed at the top of the ticket than The Lake Shore and Michigan Southern Railway Company?

A. Well, in the new form of tickets I think some of them have the name of the railroad on which the destination of the ticket is located, that is, if it reads over more than two or three or four railroads, the name of the railroad on which the destination of the ticket is located is always shown on the contract.

Q. Well, is it true that there are any forms now supplied to you with the name of any other railroad at the top of the ticket than one of the New York Central lines?

A. Any other railroad?

Q. In the place where on this ticket attached to the C. K. Fauver affidavit are found the words "New York Central & Hudson River Railroad?"

A. At the top of the ticket?

Q. At the top of the ticket; have you now applied to you any tickets containing the name of any railroad in that place on the form than one of the railroads of the New York Central lines?

A. Yes, with the new form of ticket similar to that reading to a destination on the Delaware, Lackawana & Western out of Buffalo would have "D. K. & W." where this has "New York Central and Hudson River."

Q. You have such tickets on sale in your office, have you?

A. Yes, sir.

Recross-examination of Wilbert A. Barr.

By Judge Lewis:

Q. I understand you to say you have tickets on sale going to different points in the country and practically all over the important lines in the country, exactly the same as the tickets that you have for sale over the so-called New York Central Lines?

A. They are all exactly the same, the same form of ticket and they are sold under the same conditions.

Whereupon counsel for defendants offered in evidence the book which has been marked for identification "Defendants' Exhibit A."

Whereupon the plaintiff rested.

Rebuttal.

The defendants, to rebut the evidence offered by the plaintiff, called as a witness L. A. ROBINSON, who being first duly sworn, testified as follows:

Direct examination.

By Judge Lewis:

Q. State your name?

A. L. A. Robinson.

Q. What is your business, Mr. Robinson?

A. General passenger agent of the Lake Shore Road.

Q. (indicating): I show you a paper marked "Affidavit of C. K. Fauver," which has attached to it a coupon ticket reading: "From Buffalo, New York, to Rochester, New York," and ask you if the name signed to that ticket is your name?

A. Yes, sir.

Q. What is that ticket?

Judge Henry: We object; it is perfectly apparent on the face of it what it is.

Q. Is that a coupon ticket?

Judge Henry. That is apparent on the face of it, if the court please.

The Court: You may answer the question.

A. The ticket is what is known as a coupon interline ticket.

Q. And that ticket was issued by what company?

A. The Lake Shore.

Q. Is there anything on the ticket that indicates that outside of your name?

A. Yes, sir.

Judge Henry: That is apparent, if the court please.

Judge Lewis: If it is conceded then that the ticket shows that it was issued by the Lake Shore, all right.

Judge Henry: The ticket shows that. The phrase "Issued by the Lake Shore" is on there.

Q. On the top of that ticket are the words "New York Central and Hudson River Railroad Company," or something to that effect. Who caused those words to be printed there?

A. The passenger department.

Q. Who is the passenger department principal?

A. I am at the head of the passenger department.

Q. And what, if you know, is the purpose of those initials, or those words on the top of that ticket?

A. There is nothing unusual about it. It is a form of ticket that is being quite commonly adopted by the railways of this country now.

Q. Is that the usual form that is being issued by the Lake Shore

to various points as far as you issue coupon tickets?

53 A. It is the form recently adopted,—not within a few weeks, but within the past year or two.

Q. What do those words mean, and what is the purpose of them, on the top of the ticket?

Judge Henry: We object.

The Court: He may answer the question.

Judge Henry: We except.

A. The purpose is to validate the ticket. It shows that it is a bona fide, regular authorized issue of ticket, authorized by the Lake Shore on account of The New York Central and Hudson River Railroad.

Q. And the same would be true of any other railroad?

A. Exactly so.

Q. Have you any employment with the New York Central and Hudson River Railroad Company?

A. No, sir.

Q. Your employment is solely with the Lake Shore?

A. Yes, and the Pittsburgh & Lake Erie.

Q. Do you get any pay from the New York Central and Hudson River Railroad Company at all?

A. No, sir.

Q. Or from any other railroad except The Pittsburgh & Lake Erie and the Lake Shore?

A. That is all.

Cross-examination of L. A. Robinson.

By Judge Henry:

Q. Mr. Roberston, these forms brought in here by the makers of this motion to quash the service, Exhibits B, C and D, are those old forms, are they not, if the new form is of the sort you have described?

A. Oh, yea, it was the common practice all over the country to have the destination, also a separate coupon in addition to the contract. Then, by forced economy it was discovered that that coupon was unnecessary, and the essentials could be incorporated in the contract, and it is a matter of economy in printing, to save the cost of one coupon.

Q. And these old ones are now exhausted?

A. As the old stock is exhausted we are replacing them with the new form.

Q. And the new form is the one attached to the C. K. Fauver affidavit?

A. Yes, I recognize it as such.

Q. Who is your superior officer?

A. J. W. Daly, traffic manager.

Q. Who is your second superior officer?

A. The vice president, C. F. Daly.

Q. Who is president of the Lake Shore?

A. Mr. A. H. Smith.

54 Q. He is also president of the New York Central and Hudson River Railroad Company, is he not?

A. I so understand.

Q. Do you print these tickets, these new forms, such as are attached to the C. K. Fauver affidavit?

A. The contract for printing those tickets would be placed by the purchasing agent on request of my department.

Q. Who is the purchasing agent?

A. Mr. Ingersoll.

Q. Where is his office?

A. In Cleveland.

Q. Are the tickets printed here?

A. I see nothing on the ticket to indicate the printer's name. That information could be furnished.

Q. The copy for such tickets, however, comes from your office, and receives your approval before it is printed?

A. It receives the approval of our office, yes.

Q. And the fixing of the signature for any form of ticket is by your personal authority?

A. Yes, sir.

Q. By what authority do you undertake to issue tickets in the name and on account of the New York Central Railroad Company with the expectation that the New York Central Railroad Company is going to honor it?

A. By authority vested in the proper officer of that company and by filing of concurrences with the Interstate Commerce Commission.

Q. Those tickets, as a matter of fact, are accepted by the New York Central and Hudson River Railroad Company for so much of the passage called for by the tickets as is over their lines?

A. Yes, sir.

Q. And the tickets that are taken up by conductors of the New York Central and Hudson River Railroad Company, or the portions of such tickets as this which is attached to the C. K. Fauver affidavit, are transmitted to what office or officer by such conductors?

A. To the auditing department.

Q. Of their own company?

A. Yes, sir.

Q. And how is the accounting made afterwards, as between the issuing company and the company which takes up the final portion of the ticket?

A. That is handled also by the auditing department.

Q. Of the two companies respectively?

A. Yes, sir.

Q. And you have never received any objections or demurrers from The New York Central and Hudson River Railroad Company regarding the form of tickets that you have issued good for passage over their lines, have you?

A. Not to my knowledge.

55 Q. Was it submitted to them for their approval before it was issued?

A. This particular form of ticket?

Q. Yes?

A. Why, yes, I recall now that that particular form of ticket was adopted by common consent of participating carriers.

Q. And you, as the general passenger agent of the Lake Shore and the like officer for the New York Central and Hudson River Railroad Company, both approved of and agreed to that form of ticket to be issued for transportation over your lines?

A. Why, yes, the issuance of the ticket would carry that inference.

Q. I believe you said you were not able to say where these tickets were printed?

A. Not definitely, no, sir. If that is important to you, I expect they were printed by the Hedstrom Company of Chicago.

Q. Hedstrom Barry Company?

A. That would be it, yes.

Q. Some of those other tickets are so marked?

A. Yes, sir.

Q. Are these forms such as is attached to the C. K. Fauver affidavit printed upon the order of separate purchasing agents for the different railroads of the New York Central Lines?

A. Oh, yes, each separately operated company or system would have its own local management, and presumably handle that matter about as the Lake Shore does.

Q. Who is the general passenger agent for the New York Central and Hudson River Railroad Company?

A. Mr. Vosburg.

Q. Where is his office?

A. New York.

Q. Who is the purchasing agent for that railroad?

A. Mr. Wight is the general purchasing agent of the New York Central and Hudson River Railroad Company.

Q. I notice this Exhibit attached to the C. K. Fauver affidavit is water marked similar, "New York Central Lines." Is that true of tickets that are issued by all these railroads whose folders have been offered in evidence?

A. Well, technically, I have not seen the folders, but answering your question as I understand it, that is our trade mark and is used by all of the New York Central Lines.

Q. Is that by common understanding between the passenger agents of the several lines?

A. Oh, yes, our trade mark is on nearly everything we can get it onto.

Q. So that in the printing of these tickets this particular form and all these forms that have such water mark, are so marked by common understanding and agreement among the officers of all of the New York Central Lines where that practice is observed.

A. I wouldn't call it an agreement. It is adopted generally be-

cause it is the advertising feature. We put the oval trade mark on everything we can — get it before the public eye.

Redirect examination of L. A. Robinson.

By Judge Lewis:

Q. You spoke about concurrences. Will you tell us what you mean by that?

A. The Interstate Commerce law, commonly known as that.

Q. I know, but that doesn't mean anything to the Court. Explain it to the Court in detail just as though he never heard of it?

A. It is a form of power of attorney from one carrier to another, and the copy of that power of attorney is required to be filed by the Interstate Commerce Commission as evidence of authority for one railroad to act as agent for another.

Q. Isn't it a fact that you make a tariff of rates from various points on your line to various points on sundry other lines, and then you ask sundry other lines to concur in that tariff of rates?

A. Yes, sir.

Q. And that is what you mean by concurrence, is it not?

A. Yes, sir.

Q. All of the rates that are provided for in this book marked "Defendants' Exhibit A" are tariffs from various points which have been issued by some railroads or railroad, and concurred in by all the other over which the travel or the coupons would run?

A. In the manner just described by me, yes.

Q. (Indicating.) Now, I want to show you another ticket which is marked for identification "Defendants' Exhibit E," and ask you if that also is the usual form in which coupon tickets are issued by your road?

A. This ticket is of the same description as the one recently exhibited. It is a different form, because it reads over another road.

Q. What other railroad does it read over?

A. The Delaware, Lackawanna & Western.

Q. Is that one of the New York Central Lines?

A. No, sir.

Q. It is not considered in that classification at all?

A. No, sir.

Judge Lewis: We offer in evidence the ticket just referred to and marked for identification "Defendants' Exhibit E."

57 Recross-examination of L. A. Robinson.

By Judge Henry:

Q. Just a word about concurrences. There is then, a power of attorney on file with the Interstate Commerce Commission from the Lake Shore and Michigan Southern Railway Company to The New York Central and Hudson River Railroad Company, and also a power of attorney from the New York Central and Hudson River

Railroad Company to The Lake Shore and Michigan Southern Railway Company, each authorizing the other to sell coupon tickets good for passage from a point on the line of one to any point on the line of the other?

A. The fares named in the tariffs that have been concurred in by the connecting carrier.

Q. Is that true?

A. Yes, sir.

Q. You may state it in your own language, if you want to, but let us get at what the power of attorney covers?

A. The power of attorney covers—

Mr. West: We object to that. I think the Interstate Commerce Commission prescribes the form for that, and we can get it in a moment.

Q. Well, whatever the form is, such powers of attorney have been accepted and have been filed with the Interstate Commerce Commission?

A. Yes, sir.

Q. By the New York Central and Hudson River Railroad Company with respect to its concurrent passenger traffic arrangements with the Lake Shore and Michigan Southern Railway Company, and by the Lake Shore and Michigan Southern Railway Company with respect to its passenger traffic arrangements with The New York Central and Hudson River Railroad Company?

A. Yes, sir.

Q. Making each the agent of the other in the matter of issuing tickets of that sort?

A. Under the rules and regulations adopted.

Q. And in the form prescribed by law, if there is such a form?

A. Yes, sir.

Redirect examination of L. A. Robinson.

By Judge Lewis:

Q. Some transaction that you have referred to as between The Lake Shore and Michigan Southern Railway Company and The New York Central and Hudson River Railroad Company is also had as between The Lake Shore and Michigan Southern Railway Company and all other railroads concurring in the tariff to the various points throughout the country?

A. Precisely the same. There is no larger measure in one case than in another.

58 Q. The various railroads issue tariff as they see proper fixing a through rate and a through route over their line with other connecting lines, and that only becomes valid when it is concurred in by the other lines, or by the lines other than the one in the tariff?

A. It is not as broad as that. I, the general passenger agent of the Lake Shore and Michigan Southern Railway Company, would

NEW YORK CENTRAL & HUDSON RY. N. Y.

NON-TRANSFERABLE TICKET

GOOD FOR

ONE FIRST CLASS PASSAGE

BUFFALO, N. Y.

TO

ROCHESTER, N. Y.

When stamped and sold by an authorized Agent at the lawful fare

Subject to the following Contract between the Purchaser and all the Lines over which it reads.

A. Limit. This Ticket is good for one passage within One Day from date of issue as indicated by stamp of Agent on back hereof.

B. Stop-overs will be subject to tariff regulations.

C. "Baggage valuation is limited to One Hundred Dollars for an adult and Fifty Dollars for a child (except between points wholly within the State of New York), unless purchaser himself declares a greater valuation at time baggage is presented for transportation and pays excess valuation charges according to tariff rates and regulations."

"Between points wholly within the State of New York, baggage liability is fixed by law at One Hundred and Fifty Dollars, unless a greater valuation is declared at time of checking. In that case, a written receipt stating the value must be issued by the Agent who will make additional collection in accordance with lawfully published and filed tariff."

The right is reserved to cash this over when the ticket reads to check baggage to final destination only.

Only a limited amount of baggage can be handled on certain Trains and whenever baggage cannot be handled on the train which may be used by Purchaser of this ticket will be forwarded on next possible train.

D. Responsibility. In selling this Ticket, for passage over other lines and in checking baggage on it, this Company acts only as Agent and is not responsible beyond its own line.

Open A

Form

6 N 6

L. H. Johnson
General Passenger Agent

0
7
2
8
2

Via LS&MS, NYC&HR

Lake Shore & Michigan Ry.

CLEVELAND

TO

BUFFALO, N. Y.

Subject to conditions of contract

0
7
2
8
2

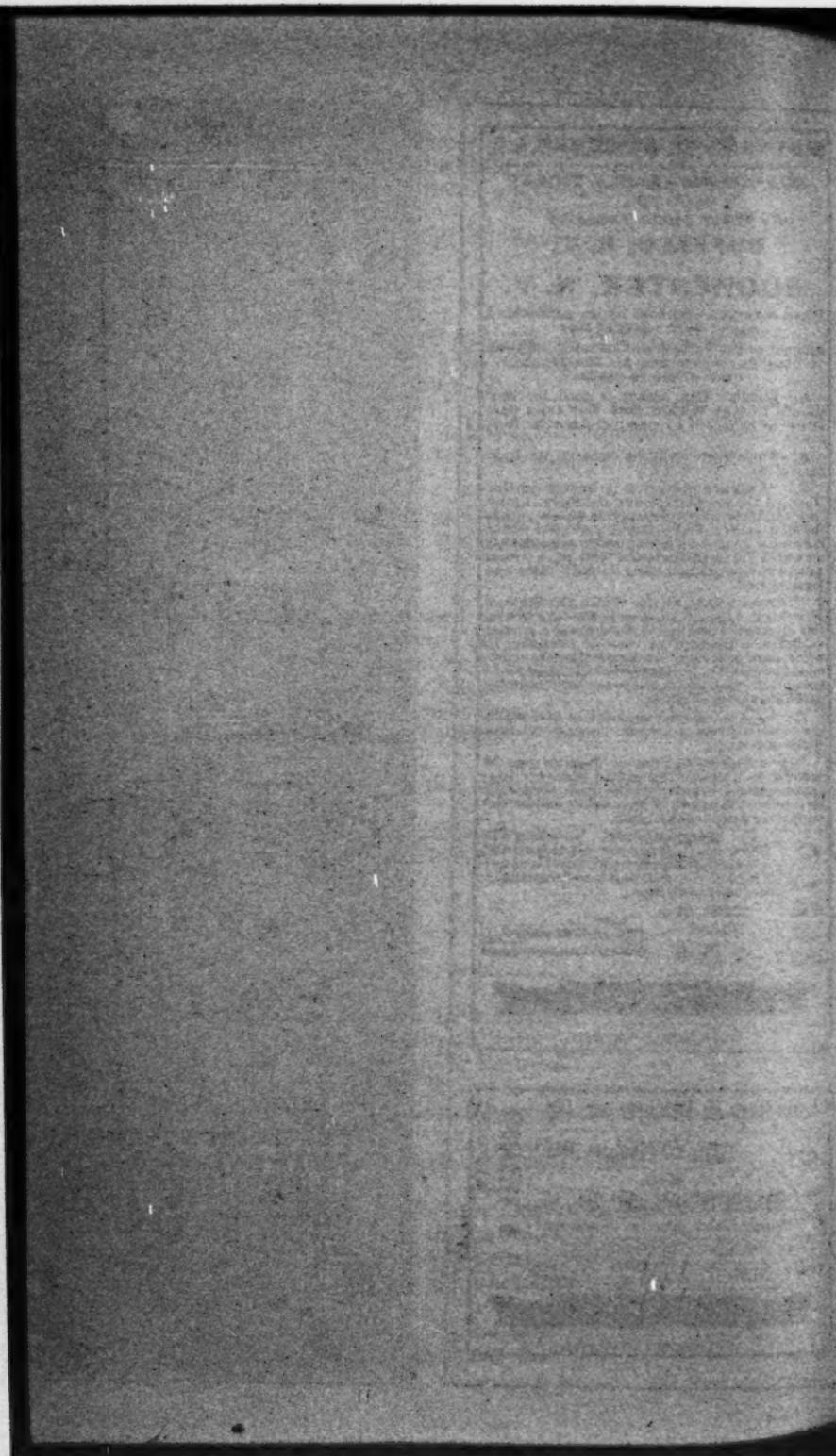
Form
6 N 6

The Company
not responsible
for damage
or loss

1st
CLASS

Destinations
ROCHESTER

VIA LS&MS, NYC&HR



not issue a tariff naming fares over the Burlington Road, if you please, at any other fares than those fixed by the Burlington Road as basing fares. The Lake Shore wouldn't have authority to name its fares over another railroad. Those fares are, in the first instance, tendered for basing purposes, then we build up our tariff.

Q. But when they concur in the proposed tariff that you have, that constitutes the tariff, and it constitutes the acceptance and the contract with reference to that through route and through rate, doesn't it?

A. Yes, sir.

Q. And that same rule and system applies to all the railroad companies alike in the country?

A. Yes, sir.

The Court: You may proceed.

Judge Lewis: We are through, if your Honor please, except that later on we might want to offer a copy of the Tariff, with the Concurrence, so that the Court will know what that means.

Judge Henry: We don't object to it.

Judge Henry: We offer in evidence the Return of the Sheriff.

Which return just offered is marked "Plaintiff's Exhibit X."

59

Affidavit of C. K. Fauver.

STATE OF OHIO,
Cuyahoga County, ss:

C. K. Fauver, being first duly sworn, says that on Saturday the 12th day of December, 1914, at 2:45 P. M., he purchased the ticket attached hereto at the ticket office of the New York Central lines situated in the Hippodrome Building, Cleveland, Ohio, and paid therefor the sum of \$6.03.

C. K. FAUVER.

Sworn to before me and subscribed in my presence this 12th day of December, 1914.

[SEAL.]

M. L. THOMSEN,
Notary Public.

(Here follows reproduction of railroad ticket marked page 59a.)

60 *Order Granting Leave to File Motion to Set Aside Service.*

Entered March 4, 1915.

By Judge Killits.

On application of defendant, The New York Central & Hudson River Railroad Company, appearing solely for the purpose of said application and not intending to enter its appearance herein leave is granted to said The New York Central & Hudson River Railroad Company to file a motion herein to set aside the return of the service of summons on it and to challenge the jurisdiction of the Court over the person of said defendant.

Motion to Set Aside Service.

Filed March 4, 1915.

Now comes The New York Central & Hudson River Railroad Company, and not intending to enter its appearance herein, but for the purposes of this motion only, and by leave of Court for that purpose, moves the Court for an order setting aside the return of the summons issued against this defendant and to quash said service, for the following reasons:

1. The W. A. Barr referred to in said return was not on the 9th day of December, 1914, or at any time prior or subsequent thereto, and is not now the regular ticket agent in charge of the business of said Company in Cuyahoga County, or elsewhere; that said Barr was not on said 9th day of December, 1914, or prior or subsequent thereto, and is not now, any officer, employe or other agent of said The New York Central & Hudson River Railroad Company.

2. Said summons does not purport to have been served on any agent of said Company in any County in this State in which the railroad of said defendant is located or through which it 61 passes. Said New York Central & Hudson River Railroad Company did not have on said 9th day of December, 1914, and has not had since, any portion of its railroad located in or passing through any County in the State of Ohio.

3. Said service was not made in accordance with the law or the rules of this Court, because W. A. Barr, the person upon whom service was attempted to be had by the Sheriff, and to whom a copy of the summons was delivered, was not at the time of the delivery of the summons herein and had not been an officer, agent or employe of this defendant; that said W. A. Barr was not, at the time of the delivery of the summons herein to him by the Sheriff, in charge of defendant's usual business office, or in defendant's usual business office in Cuyahoga County, for the reason that this defendant had, at said time, no business office, nor any other office in said County of Cuyahoga, and was not transacting any business therein.

4. That at the time of the attempted service of said summons the said The New York Central and Hudson River Railroad Company was a corporation under the laws of the State of New York, where it solely carried on its business, and was not a corporation under the laws of the State of Ohio and had no agent clothed with authority to represent it in the State of Ohio, and the person upon whom service was attempted to be made was not such an agent.

5. That at the time of said attempted service the said The New York Central and Hudson River Railroad Company was and thereafter continued to be a corporation under the laws of the State of New York, and was not and never was a corporation under the laws of the State of Ohio, and did not do and never has done business in the State of Ohio, or become subject to the service of process therein.

6. For other reasons.

CHAS. T. LEWIS,
*Attorney for Defendant The New York Central &
 Hudson River Railroad Company.*

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Affidavit of W. A. Barr.

Filed June 1, 1915.

STATE OF OHIO,
Cuyahoga County, ss:

Before me, the undersigned, a notary public in and for said county and state, personally appeared W. A. Barr, who being first duly sworn, deposes as follows:

I am the W. A. Barr mentioned in the Sheriff's return of the summons herein, and for some years prior to December 22, 1914, I was City Ticket Agent for The Lake Shore & Michigan Southern Railway Company, defendant in the above cause, and The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, my office, of which I have at all times been in charge, being located in the Hippodrome Building in Cleveland in said county. I was not on the 9th of December, 1914, nor at any other time, an officer, cashier, treasurer secretary, clerk or managing agent, ticket or freight agent, regular ticket agent, agent or employe of or in any manner connected with or employed by The New York Central & Hudson River Railroad Company, named as defendant in the above cause; nor did said last mentioned company ever have its place of business at my said office.

And further deponent saith not.

W. A. BARR.

Sworn to and subscribed by the said W. A. Barr before me and in my presence this 4th day of February, 1915.

[SEAL.]

C. R. GAULT,
Notary Public, Cuyahoga County, Ohio.

Affidavit of Charles F. Daly.

Filed June 1, 1915.

STATE OF NEW YORK,
New York County, ss:

Before me, the undersigned, a notary public in and for said county and state, personally appeared Charles F. Daly, who being first duly sworn, deposes and says:

I reside in the State of New York, and on December 22, 1914, and for more than a year prior to that time was Vice-President of The New York Central & Hudson River Railroad Company, named as defendant in the above cause. Said railroad Company was a corporation organized under the laws of the State of New York and was not a citizen or resident of the State of Ohio and had no managing agent within that state, nor did it transact any business therein. Its lines of railroad did not enter Ohio and it had in that state no chairman or president of its board of directors, or other chief officer; nor any cashier, treasurer, secretary, clerk, ticket or freight agent; nor had it within said state any office or place of business. I further depose that W. A. Barr, of Cleveland, Ohio, was not at any time an officer, managing agent, regular ticket agent, ticket agent, agent, employe or representative of said New York Central & Hudson River Railroad Company; nor was he selected or appointed by it or on its pay-roll, or under any bond to it; nor did he make any report to it; nor did said company have any power to discharge him. Said Barr had no connection whatever with said railroad company and was not authorized to accept service of process against it in the State of Ohio.

And further deponent saith not.

CHARLES F. DALY.

Sworn to and subscribed by the said Charles F. Daly before me and in my presence this 24th day of March, 1915.

[SEAL.]

J. M. O'MAHONEY,

Notary Public in and for said County and State.

Notary Public, New York Co., N. Y., No. 2911. New York Co. Register No. 5074.

My Commission Expires March 30, 1915.

Filed March 5, 1915.

Now comes the defendant, The Lake Shore & Michigan Southern Railway Company, and moves the court to dismiss the petition herein upon the following grounds:

(1) As appears by the petition, The New York Central & Hudson River Railroad Company is a necessary and indispensable party to

the petition and suit inasmuch as it appears that it is materially interested in the subject-matter of the suit and the relief prayed for will injuriously affect it, and yet said The New York Central & Hudson River Railroad Company, although named in the petition as a party defendant, is not a party to the suit because it is a corporation under the laws of the State of New York and a resident of that state and is not doing business in the State of Ohio and is not subject to be summoned into this cause and has not been duly served and has not appeared herein otherwise than specially for the purpose of moving to quash the service attempted to be made upon it.

(2) Because upon the facts stated in the petition the plaintiff is not entitled to the relief prayed for in that the rights of The New York Central & Hudson River Railroad Company are so involved that a determination of the cause without its appearance would be wholly inconsistent with equity and good conscience, and it has not been and cannot lawfully be summoned in.

(3) Because the facts stated in the petition are insufficient to constitute a valid cause of action in equity.

(4) Because the plaintiff has an adequate remedy at law.

WALTER C. NOYES,
S. H. WEST,
*Solicitors for The Lake Shore and
Michigan Southern Ry. Co.*

65 *Memorandum on Motion to Quash Service of Summons on
New York Central & Hudson River Railroad Company.*

Filed June 30, 1915.

KILLITS, J.:

Because of facts conceded in this case we are not called upon to construe Sec. 11288, General Code of Ohio, under which service was attempted to be made upon the movant in this case, the New York Central & Hudson River Railroad Company, by delivering a copy of the summons to the agent of The Lake Shore & Michigan Southern Railway Company at Cleveland. The genesis of this act shows that the original intention of the legislature was not to permit the bringing into court of a railway corporation by service upon a ticket or freight agent of the company, except in a county in which such railroad is located or through which it passed; and, if it is correct to say that the statute in its present form does allow such actions to be brought, it is because, through the process of amendment and codification a semi-colon has supplanted a comma, whereby an enlargement of opportunity for service is effected beyond the conception of the original framers of the law. If we were compelled to pass upon the question, we would be constrained to give considerable effect to the principle announced in *Allen vs. Russell*, 39 Ohio St., 336, among other cases, that no radical change of meaning was intended in revision or amendment unless the purpose is clearly mani-

fested by a change of language; and we should further consider that other standard canon of construction, that, unless compelled by specific terms of the act, an unreasonable meaning should not be given to it. Against these two considerations, it may well be said that the slight differences in punctuating effect between a comma and a semi-colon are negligible.

The court's duty in this case, however, is controlled to the end of granting the motion to dismiss the New York Central & Hudson River Railroad Company for want of proper service, because it is conceded that the moving defendant was not at all located within the State of Ohio, and that the person upon whom service was made, being the ticket agent for The Lake Shore & Michigan Central Railway Company, was no more an agent for the New York Central & Hudson River Railroad Company than he was for any other railroad corporation in the United States over whose lines he

66 was authorized to sell coupon tickets in connection with transportation to connecting points over his own employer's road.

We are controlled by Mechanical Appliance Co. vs. Castleman, 215 U. S., 437, both as to the right of the movant to ask for a dismissal notwithstanding the action of the state court, and, in connection with Wabash Western Railway Co. vs. Brow, 164 U. S., 271, that a foreign corporation not doing business in this state cannot be served therein, and that one who merely transacts business for a connecting line, although he is located within the jurisdiction, whose acts necessarily involve the foreign corporation in a transportation transaction, is not "doing business" within the federal view for such connecting foreign corporation.

If agent Barr at Cleveland was so doing business for the New York Central & Hudson River Railroad Company that he was capable of binding that company to a service upon it merely because tickets that he might sell over his employer's road read also over the moving defendant's line, then it is clear that every railroad company in the United States might be sued within this jurisdiction, for, under the rulings of the Interstate Commerce Commission and the operation of federal law on the subject, Mr. Barr at Cleveland must and does sell tickets on demand and thus transact business for any railroad company over whose line from the Lake Shore & Michigan Southern Railway Company and intervening connections coupon tickets under the regulations may be issued. We take judicial notice of railroad customs, and, therefore, know, as part of this case, that such is the business transacted by Mr. Barr's office at Cleveland. (B. & O. Rd. Co. vs. Reed, C. C. A. Sixth Circuit, decided June 17, 1915).

Our conclusion is that the motion to quash service should be granted.

June 30, 1915.

JOHN M. KILLITS,
Judge.

67

Order Setting Aside Service.

Entered June 30th, 1915, by Judge Killits.

This day this cause came on to be heard upon the motion of The New York Central & Hudson River Railroad Company, one of the defendants herein, to set aside the service of, and quash, the summons directed to said defendant, upon the grounds as set forth in said motion and was submitted to the Court upon the evidence and argument of Counsel.

Upon consideration whereof the Court, being fully advised in the premises, finds said motion to be well taken.

It is therefore ordered, adjudged and decreed, that said service and said summons be set aside and held for naught, and that said defendant, The New York Central & Hudson River Railroad Company, go hence without day and recover its costs herein expended taxed at \$—.

To which finding, order and decree the plaintiff by its counsel, then and there duly excepted.

Motion for Leave to File Supplemental Bill of Complaint and to Make New Parties Defendant.

Filed August 16, 1915.

Comes now the plaintiff, General Investment Company, and files this its motion for leave to file a supplemental petition herein and to make new parties defendant, namely: The New York Central Railroad Company, Geneva, Corning and Southern Railroad Company, The Terminal Railway of Buffalo, The Dunkirk, Allegheny Valley and Pittsburgh Railroad Company, Chicago, Indiana and Southern Railroad Company, Detroit and Chicago Railroad Company, Detroit, Monroe and Toledo Railroad Company, Kalamazoo and

68 White Pigeon Railroad Company, The Northern Central Michigan Railroad Company, The Swan Creek Railway Company of Toledo, Guaranty Trust Company of New York, Bankers Trust Company of New York, William H. Elmendorf of Indianapolis, Indiana, and John B. Cockrum of Indianapolis, Indiana.

Plaintiff exhibits herewith the Supplemental bill of complaint so proposed to be filed.

FREDERICK A. HENRY,
Of HENRY, FAUVER, McGRAW &
THOMSEN,

*Cleveland, Ohio,
Attorneys for Plaintiff.*

Supplemental Bill of Complaint.

Comes now the said plaintiff, General Investment Company, and files this its supplemental bill in equity, and says:

(1) Since the filing of its original petition herein in the Court of Common Pleas of Cuyahoga County, Ohio, the special meeting in said petition mentioned of the stockholders of the Defendant, The Lake Shore and Michigan Southern Railway Company called to convene in the City of Cleveland, Ohio, on Tuesday, the 22nd day of December, 1914, at 10:00 a. m. in the forenoon, eastern time, for the purpose of considering and voting upon the adoption and ratification of the agreement dated April 29, 1914, for the consolidation of the New York Central and Hudson River Railroad Company, The Lake Shore and Michigan Southern Railway Company, Geneva, Corning and Southern Railroad Company, The Terminal Railway Company of Buffalo, The Dunkirk, Allegheny Valley and Pittsburgh Railroad Company, Chicago, Indiana and Southern Railroad Company, Detroit and Chicago Railroad Company, Detroit, 69 Monroe and Toledo Railroad Company, The Northern Central Michigan Railroad Company, Kalamazoo and White Pigeon Railroad Company, and The Swan Creek Railroad Company of Toledo, did convene at said place and date, and then and there, over the protests and against the objections of this plaintiff and of other minority stockholders of said The Lake Shore and Michigan Southern Railway Company, pretended to, and in form did, vote upon and pass a resolution to adopt and ratify the agreement aforesaid, and also further resolutions to appoint 12:00 o'clock noon of the first Tuesday after the expiration of a period of thirty days next ensuing the filing at the office of the Secretary of States of the State of Ohio of the consolidation agreement so adopted and approved as the time, and the principal office of the New York Central and Hudson River Railroad Company in the City of Albany, State of New York, as the place, for the election of directors and other officers for the new company, and to authorize and direct the secretary of the company to file any and all instruments, certificates, etc., required by law to effectuate such consolidation.

That at said stockholders' meeting held on Dec. 22, 1914, it was claimed that 459,461 shares of stock were voted, of which 459,379 were claimed to be voted in favor of the adoption of the resolution approving said consolidation agreement. The said 459,379 shares included 452,892 shares claimed to be owned by the New York Central & Hudson River Railroad Company, the vote upon which was received and counted against the protest of this plaintiff, and other minority stockholders there present.

Plaintiff alleges that the vote on said 452,892 shares was and is illegal and void, because said stock was illegally held by the New York Central & Hudson River Railroad Company as set forth in the original petition, and that company could not lawfully vote upon the proposition to consolidate its property with that of the Lake Shore

& Michigan Southern Railway Company in which it held 9/10ths of the capital stock in violation of law, and whose lines of railroad were parallel to and normally competing with other interstate lines of railway and steamships owned or controlled by said New York Central & Hudson River Railroad Company, as alleged in the original petition. And because Mr. A. H. Smith, president of said New York Central & Hudson River Railroad Company, who voted said stock as the proxy of the New York Central & Hudson River Railroad Company, was not shown at said meeting to have any authority from the directors of said Company, or from the holders

70 of 75 per cent. in amount of the New York Central & Hudson River Railroad Company—Lake Shore collateral trust 3½% bonds, secured upon said Lake Shore stock, to vote said stock, although demand was duly made at said meeting by this plaintiff and others for evidence of such authority.

In Section 2 of Article III of the indenture executed by the New York Central & Hudson River Railroad Co. to the Guaranty Trust Company of New York, Trustee, dated February 4, 1898, under which the stock of the Lake Shore & Michigan Southern Railway Company acquired by the said New York Central was pledged to secure the issue of said Lake Shore collateral 3½% bonds, it is provided as follows:

"Unless the Railroad Company shall be in default and such default, being one mentioned under (a), (b) or (c) of Section 1 of this article, shall have continued as therein provided, the Railroad Company by its president or other officer thereunto authorized by its Board of Directors, or its Executive Committee, shall have the right to vote at all corporate meetings and elections of the Railway Company upon all shares of stock pledged hereunder, with the same force and effect as though such pledge had not been made, for all purposes not inconsistent with the provision or purposes of this indenture;"

"But under no conditions shall either the Railroad Company or the Trustee, either by vote, or by abstaining from vote or otherwise, permit, but on the contrary, in every lawful way, by vote and otherwise, they shall oppose any increase of the capital stock of the Railway Company, and (unless expressly authorized by the holders of Seventy-five per cent. in amount of the bonds issued and outstanding under this indenture) any consolidation of the Railway Company with any other railway or transportation company, either by purchase of stock or otherwise."

That at said stockholders' meeting the original of said agreement of April 29, 1914, providing for said consolidation, was not presented for the inspection and consideration of the stockholders, although its production for such purpose was duly demanded by this plaintiff and other stockholders. That the vote taken on the resolution

71 to approve said unproduced agreement was taken and counted despite the protests of this plaintiff and other stockholders.

(2) Pursuant to the said pretended resolutions, proceedings were thereafter had and taken to make said agreement for consolidation operative and effective, and to perfect the pretended organization of the alleged new corporation, The New York Central Railroad Company, resulting therefrom, and thereupon the said de facto corporation entered illegally into possession of, and has ever since possessed, operated, and claimed title to the property of the defendant, The Lake Shore and Michigan Southern Railway Company, and its property, both real and personal, situated in the Northern District of Ohio, both Eastern Division and Western Division, and elsewhere along the line of said Railway Company, as described in plaintiff's original petition, and in so doing claims to be the successor in title thereto of the defendant, The Lake Shore and Michigan Southern Railway Company, as well as the successor in title to all the property of all the companies mentioned in the resolution aforesaid.

(3) Pending this suit and pursuant to the provisions of said consolidation agreement, the pretended corporation resulting therefrom, namely, The New York Central Railroad Company, has caused to be executed and delivered, and caused to be filed for record in the offices of the recorders of the several counties in this district through which the line of railroad of the defendant, The Lake Shore and Michigan Southern Railway Company runs, as set forth in plaintiff's petition herein, a certain pretended mortgage of said pretended consolidated corporation, covering the real and personal property of the Lake Shore and Michigan Southern Railway Company, to the Bankers Trust Company of New York and William H. Elmendorf of Indianapolis, Indiana, as Trustees, to secure bonds to the amount of \$167,102,400, known as consolidation mortgage 4% bonds, to be issued in exchange for a like amount of bonds theretofore issued by the New York Central & Hudson River Railroad Company, as follows: \$90,578,400 known as Lake Shore Collateral 3½% bonds issued to buy stock of the Lake Shore & Michigan Southern Railway Company; \$19,336,000 known as Michigan Central Collateral 3½% bonds issued to buy the stock of the Michigan Central Railroad Company; \$57,188,000 of 4% debenture bonds issued by the said New York Central & Hudson River Railroad Company in the years 1904 and 1912. The Lake Shore & Michigan Southern Railway
72 Company has never received, nor can it ever receive, any sum whatsoever from the said \$167,102,400 bonds secured by said consolidation mortgage.

The said pretended corporation The New York Central Railroad Company has, as plaintiff is informed and believes, executed and delivered and has recorded or is about to place on record, in the offices of the recorders of the several counties in this district through which the line of railroad of the defendant, The Lake Shore & Michigan Southern Railway Company runs, as set forth in plaintiff's petition herein, a certain pretended mortgage of said pretended consolidated corporation, covering the property real and personal, of the Lake Shore & Michigan Southern Railway Company, known as refunding and improvement mortgage to the Guaranty Trust Company of New York, and John B. Cockrum of Indianapolis, Indiana,

as Trustees, to secure the payment of bonds (in addition to the \$167,102,400 secured by the consolidation mortgage above referred to) amounting to upwards of \$200,000,000 theretofore issued by the New York Central & Hudson River Railroad Company, no part of the proceeds of which have been, or ever can be received by the Lake Shore & Michigan Southern Railway Company.

The said pretended corporation, the New York Central Railroad Company has thereby pretended to create liens upon the real and personal property of said defendant, the Lake Shore & Michigan Southern Railway Company within this district, to the amount of upwards of \$365,000,000 from which the said last named defendant has never received any benefit whatever.

Also pending this suit, the said pretended corporation, The New York Central Railroad Company has issued 20 Year 6 per cent convertible gold debenture bonds, to the amount of \$100,000,000 and secured the same by an indenture to the Guaranty Trust Company of New York, as Trustee, dated April 21, 1915, but claimed to have been executed on May 1, 1915. The said debenture bonds are not secured by a direct mortgage upon the lines of railroad and other real and personal property of the defendant the Lake Shore & Michigan Southern Railway Company in this district, but they were sold under the representation that the interest and principal of said bonds constitute a charge upon all the earnings and the properties claimed

73 to be owned by the pretended corporation The New York Central Railroad Company, and especially upon all the earnings

and property of the defendant, The Lake Shore & Michigan Southern Railway Company. The proceeds of said bonds have been and are to be used for the purpose of paying the debts of the New York Central & Hudson River Railroad Company, a large portion of which was and is represented by unsecured notes and a portion represented by underlying bonds of certain railroads owned or controlled by the New York Central & Hudson River Railroad Co., and a large portion of the proceeds have been or are to be used in the payment of notes issued by the New York State Realty & Terminal Company, whose entire capital stock of \$100,000 was and is owned by the New York Central & Hudson River Railroad Company, which said notes to the amount of about \$18,500,000 are claimed to have been issued for the purchase of \$3,700,000 par value of the defendant Lake Shore & Michigan Southern Railway Company at \$500 per share.

(4) Also pending this suit and pursuant further to the provisions of said consolidation agreement, the secretary of the defendant, The Lake Shore and Michigan Southern Railway Company has caused to be filed in the office of the Secretary of State of the State of Ohio a copy of said consolidation agreement, with certificate of the pretended passage of the resolution of the stockholders of said company aforesaid adopting and approving the same, and has thereby pretended to transfer the real and personal property of said Defendant, The Lake Shore and Michigan Southern Railway Company, within this District to said consolidated corporation.

(5) Pursuant further to the proceedings aforesaid, the stockholders (other than plaintiff and other objecting and protesting minority stockholders) together with the officers of the several constituent companies above named, including the Defendants, The Lake Shore & Michigan Southern Railway Company and the New York Central and Hudson River Railroad Company, pretend and claim that, by virtue of said consolidation agreement and the proceedings aforesaid had and taken pursuant thereto, and of the laws of Ohio and of the other states wherein their lines run, the corporate existence of said companies has been merged in that of the alleged new corporation, The New York Central Railroad Company, which is pretended to result from said alleged consolidation; that their officers are *functi officio*, and that title to all the real and personal property of said constituent companies in this judicial district and elsewhere has passed to it.

74 The Constitution of the State of Illinois (Article XI, Section 11), provides that a majority of the board of directors of all railroad companies incorporated in that state shall be citizens and residents of that state. There is no provision in the constitution of Illinois for the consolidation of railroad companies and no provision therein which in any way modifies the aforesaid limitation of the right of corporations organized in that state to select directors who are not residents of that state. There is no provision (constitutional or otherwise) in any other state wherein the New York Central Railroad Company is organized which interferes with, or prevents, obedience to the aforesaid provision of the Illinois constitution. The said constitutional provision is binding upon the said Railroad Company in each of the States in which it is organized.

The New York Central Railroad Company claims to be a consolidated Railroad Company organized under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois. It has filed in the office of the Secretary of State of Illinois as its charter, the articles of consolidation contained in the agreement of April 29, 1914, hereinbefore referred to. The said New York Central Railroad Company has no legally constituted board of directors; because, contrary to the requirement of the Constitution of Illinois as aforesaid, only one of the fifteen members of said board is a citizen and resident of Illinois and no legal or valid steps have been taken by the New York Central Railroad Company authorizing any of the steps or proceedings in furtherance of said plan of consolidation, or the execution of said two mortgages and the issue of said Debenture bonds.

(6) All said resolutions, proceedings, instruments, mortgages and acts, and also the said pretended consolidation agreement therefor, were and are illegal and void for the reasons set forth in the original petition herein, but the same constitute an apparent legal or equitable lien upon and claim to and an incumbrance and lien and cloud upon the title to real and personal property within this district, namely, the said property in Ohio formerly possessed by the Defendant, The Lake Shore and Michigan Southern Railway Company, as aforesaid.

(7) Said consolidation agreement, dated April 29, 1914, was authorized by the board of directors and executed and acknowledged by the proper officers of each of the companies to be consolidated as hereinbefore alleged.

75 Said Geneva, Corning and Southern Railroad Company was and is a railroad corporation organized and existing under the laws of the States of New York and Pennsylvania, with its principal office in the Grand Central Terminal in the City and State of New York. Said The Terminal Railway of Buffalo was and is a railroad corporation organized and existing under the laws of the State of New York, with its principal office in the Grand Central Terminal in the City and State of New York. Said The Dunkirk, Allegheny Valley and Pittsburgh Railroad Company was and is a railroad corporation organized and existing under the laws of the States of New York and Pennsylvania, with its principal office in the Grand Central Terminal in the City and State of New York. Said Chicago, Indiana and Southern Railroad Company is a railroad corporation organized and existing under the laws of the States of Indiana and Illinois, with offices in Chicago, Illinois, and in the Grand Central Terminal in the City and State of New York. Said Detroit and Chicago Railroad Company is a railroad corporation organized and existing under the laws of the States of Ohio and Michigan, with an office in the Grand Central Terminal in the City and State of New York. Said Detroit, Monroe and Toledo Railroad Company is a railroad corporation organized and existing under the laws of the State of Michigan, with an office in the Grand Central Terminal in the City and State of New York. Said Kalamazoo and White Pigeon Railroad Company is a railroad corporation organized and existing under the laws of the State of Michigan, with an office in the Grand Central Terminal in the City and State of New York. Said the Northern Central Michigan Railroad Company is a railroad corporation organized and existing under the laws of the State of Michigan, with an office in the Grand Central Terminal in the City and State of New York. Said The Swan Creek Railway Company of Toledo is a railroad corporation organized and existing under the laws of the State of Ohio, with an office in the Grand Central Terminal in the City and State of New York. Said corporations are respectively citizens of the state in which they are incorporated as aforesaid. Said Guaranty Trust Company of New York is a corporation organized and existing under the laws of the State of New York, and is a citizen of said State, with its principal office in the City of New York. Said Bankers Trust Company of New York is a corporation organized and existing under the laws of the State of New York, and is a citizen of said State, with its principal office in the City of New York. Said William H. Elmendorf and John B. Cockrum are citizens of the State of Indiana and residents of the City of Indianapolis in said State.

76 (8) The property in the Northern District of Ohio, which is involved in controversy herein and which, at the time of the commencement of this suit, was possessed by the defendant, The Lake

Shore and Michigan Southern Railway Company, is the line of railroad (with all rolling stock, fixtures, and other property, both real and personal, thereunto appertaining) of said company running from the boundary line between the State of Pennsylvania and the State of Ohio, through the counties of Ashtabula, Lake, Cuyahoga, Lorain, Huron, Sandusky, Ottawa, Wood, Lucas, Fulton and Williams, in said district, and the matter in controversy exceeds in value the sum of three thousand dollars exclusive of interest and costs.

Wherefore, plaintiff further prays:

(a) that said de facto corporation, The New York Central Railroad Company, may be made a party defendant herein;

(b) that said Geneva, Corning and Southern Railroad Company, The Terminal Railway of Buffalo, The Dunkirk, Allegheny Valley and Pittsburgh Railroad Company, Chicago, Indiana and Southern Railroad Company, Detroit and Chicago Railroad Company, Detroit, Monroe and Toledo Railroad Company, Kalamazoo and White Pigeon Railroad Company, The Northern Central Michigan Railroad Company, and The Swan Creek Railway Company of Toledo may be made parties defendant herein;

(c) that on behalf of the defendant, The Lake Shore and Michigan Southern Railway Company, its lawful right and claim to its said property in this district be enforced, and its title thereto be quieted as against the claims of any and all defendants herein, and that the incumbrance, lien and cloud upon its title to its said property, which is created by said pretended consolidation and the agreement therefor, and by the said proceedings, acts and instruments in pursuance thereof, be removed;

(d) that said de facto corporation, The New York Central Railroad Company, be ousted from its possession acquired pending this action, and from its claim of title to the property in this district of the defendant, The Lake Shore & Michigan Southern Railway
77 Company, and that it be ordered to restore the same to said last named Company;

(e) that said Bankers Trust Company of New York, Guaranty Trust Company of New York, William H. Elmendorf of Indianapolis, Indiana, and John B. Cockrum of Indianapolis, Indiana, may be made parties defendant herein;

(f) that said mortgage of said de facto corporation, The New York Central Railroad Company to said Bankers Trust Company and William H. Elmendorf, be decreed to be void and of no effect as to the said property in this district;

(g) that said mortgage of said de facto corporation, The New York Central Railroad Company to said Guaranty Trust Company and John B. Cockrum, be decreed to be void and of no effect as to the said property in this district.

(b) To the end that this plaintiff may obtain the relief prayed for herein, it further prays the court to grant it process by subpoena directed to such of the defendants herein as have not yet been served with process or entered their voluntary appearance herein (so far as they are personally servable within this district; otherwise for substituted process), namely: Central Trust Company of New York, New York Central & Hudson River Railroad Company, William A. Read, Henry Evans, Willis D. Wood, Geneva, Corning and Southern Railroad Company, The Terminal Railway of Buffalo, The Dunkirk, Allegheny Valley and Pittsburgh Railroad Company, Chicago, Indiana and Southern Railroad Company, Detroit and Chicago Railroad Company, Detroit, Monroe and Toledo Railroad Company, Kalamazoo and White Pigeon Railroad Company, The Northern Central Michigan Railroad Company, and The Swan Creek Railway Company of Toledo, Bankers Trust Company, Guaranty Trust Company, William H. Elmendorf and John B. Cockrum, defendants herein named, commanding them to appear and answer, but not under oath, the same being waived, all of the allegations of the bill herein filed;

(i) and for all such other and further relief as equity and good conscience may require.

FREDERICK A. HENRY,
Of HENRY, FAUVER, McGRAW & THOMSEN,
Cleveland, Ohio,
Attorneys for Plaintiff.

78 STATE OF NEW YORK,
County of New York, as:

Personally appeared before me, a Notary Public in and for said County and State, Clarence H. Venner, who being first duly sworn, says that he is the President of the General Investment Company, plaintiff in the above entitled action; that he has read the foregoing supplemental bill of complaint; and that the allegations therein contained are true.

CLARENCE H. VENNER.

Sworn to before me and subscribed in my presence this 4th day of August, 1915.

CHAS. E. ROBINSON,
Notary Public, No. 259,
New York County, N. Y.

Motion for Substituted Process for the New York Central and Hudson River Railroad Company.

Filed August 16, 1915.

Comes now the said plaintiff, General Investment Company, and still excepting and protesting to the quashing of the service of summons on the defendant, The New York Central and Hudson River Railroad Company, files this its motion for substituted process under

Section 57, Judicial Code, for and upon the defendant, The New York Central and Hudson River Railroad Company, and files here-with the affidavit of its President.

FREDERICK A. HENRY,
OF HENRY, FAUVER, McGRAW & THOMSEN,
Cleveland, Ohio,
Attorneys for Plaintiff.

79 *Affidavit in Support of Motion for Substituted Process for the New York Central and Hudson River Railroad Company.*

Filed August 16, 1915.

STATE OF NEW YORK,
County of New York, ss:

On this 4th day of August, 1915, before me, the subscriber, a Notary Public in and for said County and State, personally appeared Clarence H. Venner, who being by me duly sworn, upon his oath says, that he is the President of the General Investment Company, plaintiff in the above entitled action, and makes and files this affidavit in its behalf and in support of its motion for substituted service for The New York Central and Hudson River Railroad Company; that the service of summons upon said defendant having been quashed by order of this court, to which ruling plaintiff excepted and still excepts and protests, said defendant cannot be served with process in the Northern District of Ohio; that its place of residence and post office address, and the place where this affiant believes process can be served upon said defendant personally, is Grand Central Terminal in the City and State of New York.

Affiant further says that the property involved in this proceeding is that part of the railroad (with all rolling stock, fixtures, and other property, both real and personal, thereunto appertaining) of The Lake Shore and Michigan Southern Railway Company lying within the State of Ohio and running from the boundary line between the State of Pennsylvania and the State of Ohio through the counties of Ashtabula, Lake, Cuyahoga, Lorain, Huron, Sandusky, Ottawa, Wood, Lucas, Fulton and Williams, in the Northern District of said State of Ohio.

Said property is now in charge of the *de facto* corporation, The New York Central Railroad Company, and the officers and directors thereof, namely:

President, Alfred H. Smith, Chappaqua, New York.

Vice-President, William K. Vanderbilt, Jr., Northport, New York.

80 Treasurer, Edward L. Rossiter, Greenwich, Connecticut.

Secretary, Dwight W. Pardee, New York, New York.

Director, William K. Vanderbilt, Oakdale, New York.

Director, Chauncey M. Depew, New York, N. Y.

Director, Frederick W. Vanderbilt, New York, N. Y.

Director, William Rockefeller, New York, N. Y.
Director, William H. Newman, New York, N. Y.
Director, Horace E. Andrews, New York, N. Y.
Director, George F. Baker, New York, N. Y.
Director, Marvin Hughitt, Chicago, Illinois.
Director, William K. Vanderbilt, Jr., Northport, New York.
Director, Alfred H. Smith, Chappaqua, New York.
Director, Harold S. Vanderbilt, New York, N. Y.
Director, Ogden Mills, Staatsburg, New York.
Director, Robert S. Lovett, Locust Valley, N. Y.
Director, Leonard J. Hackney, Cincinnati, Ohio.
Director, Frank J. Jerome, Painesville, Ohio.

having its and their principal office in Grand Central Terminal in the City and State of New York.

CLARENCE H. VENNER.

Subscribed by the said Clarence H. Venner in my presence, and by him sworn to before me this 4th day of August, 1915.

[SEAL.]

CHAS. E. ROBINSON,
Notary Public, No. 259,
New York County, N. Y.

81 Motion for Substituted Service on William A. Read, Henry Evans, and Willis D. Wood, and on Geneva, Corning and Southern Railroad Company, the Terminal Railway of Buffalo, the Dunkirk, Allegheny Valley & Pittsburgh Railroad Company, Chicago, Indiana & Southern Railroad Company, Detroit and Chicago Railroad Company, Detroit, Monroe and Toledo Railroad Company, Kalamazoo and White Pigeon Railroad Company, the Northern Central Michigan Railroad Company, the Swan Creek Railway Company of Toledo, Guaranty Trust Company, Bankers Trust Company, William H. Elmendorf and John B. Cockrum.

Filed August 16, 1915.

Comes now the plaintiff, General Investment Company, and moves for substituted process under Section 57, Judicial Code, for Defendants, William A. Read, Henry Evans, Willis D. Wood, and for Geneva, Corning and Southern Railroad Company, The Terminal Railway of Buffalo, The Dunkirk, Allegheny Valley & Pittsburgh Railroad Company, Chicago, Indiana and Southern Railroad Company, Detroit and Chicago Railroad Company, Detroit, Monroe and Toledo Railroad Company, Kalamazoo and White Pigeon Railroad Company, The Northern Central Michigan Railroad Company, The Swan Creek Railway Company of Toledo, Guaranty Trust Company, Bankers Trust Company, William H. Elmendorf and John

B. Cockrum, and files herewith the affidavit of its President in support of such motion.

FREDERICK A. HENRY,
Of HENRY, FAUVER, McGRAW &
THOMPSEN,
Cleveland, Ohio,
Attorneys for Plaintiff.

82 *Affidavit of Clarence H. Venner in Support of Motion for Substituted Service on William A. Read et al.*

Filed August 16, 1915.

STATE OF NEW YORK,
County of New York, ss:

On this 4th day of August, 1915, before me, the subscriber, a Notary Public in and for said County, personally appeared Clarence H. Venner, who being by me first duly sworn, upon his oath says, that he is President of the Plaintiff, General Investment Company; that the Defendants, William A. Read, Henry Evans, and Willis D. Wood, and Geneva, Corning and Southern Railroad Company, The Terminal Railway of Buffalo, The Dunkirk, Allegheny Valley and Pittsburgh Railroad Company, Chicago, Indiana and Southern Railroad Company, Detroit and Chicago Railroad Company, Detroit, Monroe and Toledo Railroad Company, Kalamazoo and White Pigeon Railroad Company, The Northern Central Michigan Railroad Company, The Swan Creek Railway Company of Toledo, Guaranty Trust Company, Bankers Trust Company, William H. Elmendorf and John B. Cockrum, cannot be served with process in the Northern District of Ohio.

The place of residence and post office address of said William A. Read is 4 East 62nd Street, New York City, New York; of said Henry Evans is 11 East 45th Street, New York City, New York; and of said Willis D. Wood is 447 Park Avenue, New York City, New York, at which places it is believed process can be served upon each of them personally.

The places of residence and post office addresses of the railroad and railway companies above named are unknown to affiant, but the place where it is believed process can be served upon each of them personally is Grand Central Terminal in the City and State of New York.

The place of residence and post office address, and the place where it is believed process can be served upon Guaranty Trust Company are the City and State of New York.

83 The place of residence and post office address, and the place where it is believed process can be served upon Bankers Trust Company, are the City and State of New York.

The place of residence and post office address, and the place where it is believed process can be served upon William H. Elmendorf, are the City of Indianapolis, State of Indiana.

The place of residence and post office address, and the place where

it is believed process can be served upon John B. Cockrum, are the City of Indianapolis, State of Indiana.

Affiant further says that the property involved in this proceeding is that part of the railroad (with all rolling stock, fixtures, and other property, both real and personal, thereunto appertaining) of The Lake Shore and Michigan Southern Railway Company lying within the State of Ohio and running from the boundary line between the State of Pennsylvania and the State of Ohio through the counties of Ashtabula, Lake, Cuyahoga, Lorain, Huron, Sandusky, Ottawa, Wood, Lucas, Fulton and Williams, in the Northern District of said State of Ohio.

Said property is now in charge of the de facto corporation, The New York Central Railroad Company, and the officers and directors thereof, namely:

President, Alfred H. Smith, Chappaqua, New York;
Vice-President, William K. Vanderbilt, Jr., Northport, New York;
Treasurer, Edward L. Rossiter, Greenwich, Connecticut;
Secretary, Dwight W. Pardee, New York, N. Y.;
Director, William K. Vanderbilt, Oakdale, New York;
Director, Chauncey M. Depew, New York, N. Y.;
Director, Frederick W. Vanderbilt, New York, N. Y.;
Director, William Rockefeller, New York, N. Y.;
Director, William H. Newman, New York, N. Y.;
Director, Horace E. Andrews, New York, N. Y.;
Director, George F. Baker, New York, N. Y.;
Director, Marvin Hughitt, Chicago, Illinois;
Director, William K. Vanderbilt, Jr., Northport, New York;
Director, Alfred H. Smith, Chappaqua, New York;
Director, Harold S. Vanderbilt, New York, N. Y.;
Director, Ogden Mills, Staatsburg, New York;
Director, Robert S. Lovett, Locust Valley, N. Y.;
84 Director, Leonard J. Hackney, Cincinnati, Ohio;
Director, Frank J. Jerome, Painesville, Ohio;

having its and their principal office in Grand Central Terminal in the City and State of New York.

CLARENCE H. VENNER.

Subscribed by the said Clarence H. Venner in my presence, and by him sworn to before me this 4th day of August, 1915.

[SEAL.]

CHAS. E. ROBINSON,

Notary Public, No. 259,
New York County, N. Y.

Motion by Plaintiff to Remand Cause to State Court.

Filed October 29, 1915.

And now comes the plaintiff and moves the court, before passing upon the several motions herein filed, to remand the above entitled

cause to the State court, from whence it was removed for trial, because:

The plaintiff is not a resident of this district; the defendants that join in the petition for removal are not both residents or inhabitants of this district; the defendant, The Lake Shore and Michigan Southern Railway Company, is not a non-resident of this State; there is no separable controversy herein between plaintiff and the defendant, The New York Central and Hudson River Railroad Company which can be fully determined as between them, neither is said last named company a resident or inhabitant of this district; and the defendant, The Lake Shore and Michigan Southern Railway Company, though being a resident and inhabitant of this district and division, disclaims in and by its motion to dismiss filed herein the existence in this suit of any controversy which can be fully determined as between it and plaintiff without The New York Central and Hudson River Railroad Company.

85 Wherefore, plaintiff says that neither said defendant, The Lake Shore and Michigan Southern Railway Company, nor said defendant, The New York Central and Hudson River Railroad Company, was or is entitled, nor are both said defendant companies jointly so entitled, to such removal of this cause; and this court in and for the district aforesaid has no jurisdiction to try and determine this case, and plaintiff prays that the same may be remanded to the Court of Common Pleas of Cuyahoga County, in the State of Ohio, from whence it came.

FREDERICK A. HENRY,
Of HENRY, FAUVER, McGRAW &
THOMSEN,
Solicitors for Plaintiff.

86 In the United States District Court, Northern District of Ohio, Eastern Division.

GENERAL INVESTMENT COMPANY, Plaintiff,
vs.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY et al.,
Defendants.

JOSEPH W. JACKSON and GENERAL INVESTMENT COMPANY,
Plaintiffs,

vs.
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY and
WILLIAM K. VANDERBILT, Defendants.

Brief in Opposition to Motion to Remand.

Doyle, Lewis, Lewis & Emery,
Solicitors for Defendants.
Walter C. Noyes,
Saml. H. West,
Chas. T. Lewis,
Counsel.

87 In the United States District Court, Northern District of Ohio, Eastern Division.

No. —.

GENERAL INVESTMENT COMPANY, Plaintiff,

vs.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY et al.,
Defendants.

Brief in Opposition to Motion to Remand.

Statement.

This action is brought by the General Investment Company, a citizen of Maine, and the defendants named in the caption of the bill are The Lake Shore & Michigan Southern Railway Company, The New York Central & Hudson River Railroad Company, Central Trust Company of New York, William A. Reed, Henry Evans and Willis D. Wood.

The plaintiff alleges that it has owned since June 27th, 1914, 5 shares of the 500,000 shares of the capital stock of The Lake Shore & Michigan Southern Railway Company, and is also the owner of 300 shares out of a total of 2,250,000 shares of the capital stock of

(2)

The New York Central & Hudson River Railroad Company. The action is conceded to be primarily for the purpose of preventing the carrying out of a contract of consolidation entered into on April 29th, 1914, between the Lake Shore, the New York Central and nine other railroad companies.

The petition filed in the State Court and which now becomes part of the record in this court, discloses that the bill would be open to the charge of multifariousness because it sets forth, in effect, three separate causes of action, in which all of the defendants are not interested, and it clearly discloses the existence of separable controversies. The alleged ground of illegality in the proposed consolidation is in substance, that The New York Central & Hudson River Railroad Company is engaged in interstate commerce and that it, in violation of the Federal Anti-Trust Act, holds the majority of the capital stock of the West Shore Railroad Company, another interstate railroad, which it is alleged is parallel and competing with the New York Central, and a majority of the capital stock of the Michigan Central, which it is alleged is a competitor of the Lake Shore. It is further alleged that the Lake Shore is the owner of a majority of the capital stock of the Nickel Plate and some other railroads, all of which are charged as being engaged in interstate commerce and as being competitors of the Lake Shore. It is also alleged that the New York Central is the owner of Ninety

(90%) per cent. of the capital stock of the Lake Shore. The precise ground of the illegality of the proposed consolidation is the fact that this ownership of stock by the New York Central and by the Lake Shore, is in violation of the Federal Anti-trust laws and for that reason the consolidation should be prohibited. This controversy is one which of the defendants only the Lake Shore and the New York Central would have any interest whatever.

(3)

The petition, or bill, further alleges that the three individual defendants representing a Committee of Lake Shore stockholders, had brought certain suits against the Lake Shore for the purpose of preventing the consolidation, and that on October 16th, a settlement was made by the Lake Shore with this Committee, under the terms of which the Lake Shore agreed to purchase not exceeding Fifteen Thousand (15,000) shares of Lake Shore stock of such dissenting stockholders and execute its note for the value of the stock so to be purchased, at the rate of \$500.00 per share, the note and stock to be deposited with the Central Trust Company and to be paid on or before December 15th, 1914, and on payment, the note and stock to be delivered to the Railway Company. The petition discloses that this was a completed transaction; the note was executed and it together with the stock was deposited with the Central Trust Co. The only interest of the Trust Company, as a defendant, is that of a depository. In connection with this agreement, there was also to be paid the sum of \$200,000.00, as part consideration for the stock and settlement aforesaid. The only defendant interested in this controversy is the Lake Shore.

There are further averments to the effect that the New York Central was about to issue its 4% Bonds to exchange for certain 3½% Bonds previously issued and outstanding by the New York Central Company, and this issue and the prayer herein relate exclusively to the plaintiff and the New York Central.

89 The prayer of the bill, as it now appears in this court, discloses the three separable controversies just described. The first paragraph of the prayer is for an injunction enjoining the New York Central from voting the majority shares of stock held by it in the Lake Shore Company, that being disclosed as the method adopted by the pleader to prevent the consolidation. That is followed by other paragraphs of the prayer directed to the Lake Shore,

(4)

enjoining it from permitting the consolidation, or carrying out the agreement for consolidation referred to, and from receiving the vote at a stockholders' meeting of the New York Central Company. Then follows a prayer that the Lake Shore be enjoined from paying the note alleged to be in the hands of the Central Trust Company, and from purchasing or receiving the shares of stock provided for in connection with the note. The prayer further asks that the New York Central alone be enjoined from making the exchange of its 4% bonds for its 3½% bonds hereinabove referred to, and it further

prays generally, that if the consolidation is adopted, pending the action, that the same be set aside.

It is perhaps sufficient to say, that for all the purposes of this motion, the record discloses that no precipe has been filed or summons issued for either the Central Trust Company or the three individual defendants and none of these defendants have entered their appearance, and there is no issue made in the bill as against them and there is no prayer for relief made against either one of said four defendants.

The petition was filed in the State Court on the — day of December, 1914, and thereafter and in due time, a petition and bond for removal of the case were filed by the Lake Shore, the New York Central and The New York Central Railroad Company, the latter being the consolidated Company which came into being shortly after the finding of the original petition. The petition for removal was duly allowed and the bond approved and the transcript was filed in this court, February 3rd, 1915, and shortly thereafter, a motion was filed by The New York Central & Hudson River Railroad Company to quash the summons as against that defendant, for the reason as set out in the motion, and especially because that Company, as disclosed by the petition, and as a matter of fact, was a corporation and citizen of the State of New York. The plaintiff thereafter executed and filed with the court, a stipulation in the case relating to affidavits

and other evidence to be considered by the court on the hearing of the motion to quash, and also appeared and presented a full brief in opposition to that motion, and no question was made by the plaintiff as to the validity of the removal or jurisdiction of this particular court. This court, however, on the — day of —, 1915, found the motion to quash to be well taken, and the same was granted, and an order to that effect entered on the journals of the court.

On August 16th, 1915, the plaintiff filed in this court in this action, three several motions, one for leave to file a Supplemental Bill, one for an order for constructive service on the New York Central & Hudson River Railroad Company, and one for an order for constructive service on several other defendants proposed to be made by the Supplemental Bill. On the day prior to the hearing of these motions and on October 30th, the plaintiff for the first time, filed its motion to remand.

Argument.

We submit that upon the foregoing statement, the motion of the plaintiff herein made to remand is not well taken and among others, for the following very substantial reasons:

First. Because it clearly appears from the bill, that the action to prevent the consolidation upon the grounds alleged in the bill, presents a Federal question which would entitle the actual defendants to remove the case to the Federal Court, and in addition to this, The New York Central & Hudson River Railroad Company—an indis-

pensable party to the issue involving consolidation—was entitled to remove under the facts disclosed by the record, because of diversity of citizenship.

(6)

Second. Because this court would have general jurisdiction of an action such as is disclosed by the record, and the plaintiff by acquiescence has consented to the exercise of that jurisdiction by this court, and waived the right, if any it had, to remand.

Third. Because this court, by its order heretofore made, has indicated that the New York Central & Hudson River Railroad Company was never legally a defendant in this action, and is not now a defendant in the action, and as the other defendants are mere nominal parties, none of whom have been brought into court, or indeed, can be brought into this court, the action now stands as one brought by the plaintiff, a corporation of Maine, against the Lake Shore alone, a corporation of Ohio, and by reason of the fact that the action is one arising under the constitution and laws of the United States that sole defendant would be entitled under the law to remove the case to the Federal Court.

I.

The Case Was Properly Removed.

For the purpose of the discussion of all the points which we desire to call to the attention of the court, it will be well to have before us the Federal Statutes, or so much of them, as apply to a case of this character, which relate to the subject of jurisdiction and also to the removal of causes. The statute relating to jurisdiction, as now in force, is found in Section 991 of the Complied Statutes, and that part of it relating to the matter with which we are dealing, reads as follows:

"Sec. 991. (Judicial Code, Sec. 24.) The District Court shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands

(7)

under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states.

* * * * *

Eight. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive juris-

diction of which has been conferred upon the Commerce Court
* * *

Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies."

The provisions for removal are found in Section 1010 of the Compiled Statutes (Judicial Code, Sec. 28), and so far as we are now concerned, read as follows:

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or
92 which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant, or defendants, therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the district court of the United States for the proper district by the defendant, or defendants, being non-residents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district."

(8)

We assume that no one will challenge the proposition that the Federal courts would have general jurisdiction of a suit similar to the instant case, if the parties and the amount involved met the requirements of the statute. The record discloses that the amount and character of the case are in compliance with the statute, and the District Court would necessarily have general jurisdiction to try and determine questions similar to those involved in this action. The ground for removal, as set forth in the petition of the defendants was, first, that the suit arose under the laws of the United States, the presence of a federal question, and, second, the fact of a separable controversy between different defendants.

The definition and application of the language of the statute "arising under the Constitution or laws of the United States" has been furnished to us by the Supreme Court in language that cannot be misunderstood.

In *Ex Parte Lennon*, 168 U. S., 548, Mr. Justice Brown, speaking for the court, and on page 553, uses this language:

"It has been frequently held by this court that a case arises under the Constitution and laws of the United States, whenever the party plaintiff sets up a right to which he is entitled under such laws, which the party defendant deny to him, and the correct

93 decision of the case depends upon the construction of such laws. As was said in Tennessee vs. Davis, 100 U. S., 257, 264:

'Cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted.'

See also Starin vs. New York, 115 U. S., 248, 257; Kansas Pacific R. R. vs. Atchison, T., Etc., R. R., 112 U. S., 414; Ames vs. Kansas, 111 U. S., 449, 462; R. R. Co. vs. Mississippi, 102 U. S., 135."

(9)

The language just quoted was uttered in a case very similar to the one at bar. The Ann Arbor Railroad Company, a Michigan corporation, filed a bill for injunction against several railroad companies alleged to be citizens of Ohio and Pennsylvania, including The Michigan Central Railroad Company, which was, in fact, a corporation of Michigan. It is true that the bill averred the citizenship of all the corporations defendant to be in Ohio and Pennsylvania, but Judge Brown, in referring to this branch of the case, as showing clearly that the Federal court had jurisdiction because of the existence of a Federal question, and notwithstanding the lack of diverse citizenship uses this language:

"Irrespective of this, however, we think the bill exhibited a case arising under the constitution and laws of the United States, as it appears to have been brought solely to enforce a compliance with the provisions of the Interstate Commerce Act of 1887, and to compel the defendants to comply with such act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to receive from complainant, for transportation over their lines, any cars which might be tendered them."

That a case of the character of the one at bar is a suit arising under the Constitution and laws of the United States, is shown by a large array of authorities, such as Bigelow vs. Calumet & Heckla Min. Co., 155 Fed. 869, in a decision by Judge Knappen, and the same case in an opinion by the Circuit Court of Appeals found in 167 Fed., 721.

In that case the plaintiff brought his action charging the defendant with having acquired more than a majority of the stock of The Osceola Company, in which the plaintiff was a stockholder, 94 and that the effect of this ownership in the defendant, was to restrain trade and create a monopoly, and otherwise violate the Federal statutes. Independently of the question of the right of the plaintiff, as an individual, to maintain the action, both courts

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sustained the jurisdiction of the court substantially as involving a question under the laws of the United States, although it was finally decided on its merits in favor of the defendant.

In Gulf C. & S. P. Ry. Co. vs. Miami S. S. Co., 86 Fed. 407, it was said:

"We do not doubt the general jurisdiction of the Circuit Court as a court of equity to afford preventive relief, in a proper case, against threatened injury about to result in an individual, or any unlawful agreement, combination or conspiracy in restraint of trade."

No one questioned the jurisdiction of the court over the subject-matter, in the suit brought by Spencer in Detroit, to prevent this same consolidation, or in the Spencer case brought in this court, for the same purpose, or in the case of De Koven et al. vs. The Lake Shore, 216 Fed., 955, brought in the Southern Division of the District Court of New York, also to prevent this same consolidation.

Judge Grubb, in overruling the motion for a preliminary injunction, in the De Koven case uses this pertinent language:

"In view of the fact that the illegal control, if it be illegal, existed before as well as after consolidation, and, so far as the ownership of the New York, Chicago & St. Louis Company is concerned, with the acquiescence of the plaintiffs and the other minority stockholders of the Lake Shore Company; and in view of the fact that the illegality in the combination, if any exists, can be removed, without disturbing the consolidation of the two defendants, and upon terms fraught with only conjectural injury to the plaintiffs, it seems to me that the discretion of the court would be properly exercised by denying the motion for an injunction pending final hearing, leaving the plaintiffs to seek redress, in the interim, if entitled to any on this line, through the United States in a suit brought by it, or upon final hearing in this cause. If the United States should take action pending final hearing, it would be time enough

95 for the plaintiffs to apply to stay the consolidation pending

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the result of such action. If the consolidation should be completed pending final hearing, in the absence of governmental action, and the control of the consolidated company be held thereafter illegal, it would not follow that the consolidation would be set aside, since the illegality could be corrected by the separation of the companies subject to such control, other than those consolidated."

The bill in the case at bar discloses that the plaintiff is basing its claim for relief solely because of rights which it claims to be "entitled to under such laws (the Federal Anti-trust Laws), which the parties defendant deny to him."

As an illustration of this, the bill charges that "the acquisition by the New York Central of the control of the Lake Shore was, at the time, and its holding is now in violation of the common law, * * * of the Anti-trust Act of the United States known as the Sherman Act, passed in 1890."

A similar allegation is made as to the ownership of stock of the Michigan Central by the New York Central.

The whole bill makes it very apparent, and this will probably be conceded, that the plaintiff is basing its right to relief, largely, if not entirely, on the alleged fact that the defendants are violating the Federal laws, and whether any relief will be granted to the plaintiff is made to depend upon the construction and application of the Federal statutes, and upon this question and other questions connected therewith, the defendants are entitled to the opinion and judgment of the Federal Court.

It is not necessary that the Federal question should be the only question involved. It was held in *R. R. Co. vs. Mississippi*, 102 U. S. 135, in *Southern Pac. R. R. Co. vs. California*, 118 U. S., 12, and *People vs. Sanitary District*, 98 Fed., 150, that the suit may involve other questions, but still be removable. So that the fact that it is also alleged in the bill that the carrying out of the contract of consolidation not only violates the constitution and laws of the United States, but also the Constitution and laws of the several

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states through which the railroad of the two defendants run, does not affect the right of the petitioners to remove.

In *Garrett vs. Louisville & Nashville R. R. Co.*, 197 Fed. 715 (our Circuit Court of Appeals), Judge Warrington, Knappen and 96 Denison, it was held in a case arising under the Federal Employers' Liability Act:

"Still the action might originally have been brought and maintained by plaintiff in a federal court (Act of Congress August 13th, 1888, c. 866, Sec. 1, 25 Stat. L. 433 [U. S. Comp. St. 1901, p. 508]; Act of Congress, April 22nd, 1908, c. 149, Sec. 1, 35 Stat. L. 65; Second Employer's Liability Cases, 223 U. S. 55, 58, 57, 32 Sup. Ct. 169, 56 L. Ed. 327). True, it is not distinctly alleged in the declaration that the action is based upon the Second Employers' Liability Act; but we think this effect must be given to the averments of the declaration that deceased met his death while in the employ of the company and while it was engaged in interstate commerce. Such averments rendered the Federal Act alone applicable, and, further, the case was tried and disposed of below upon that theory. Second Employers' Liability Cases, *supra*: *Smith vs. Detroit, T. S. L. Ry. Co.*, (C. C.) 175 Fed. 507; *Cound vs. Atchison, S. F. Ry. Co.*, (C. C.) 173 Fed. 531; *Erie R. R. Co. vs. White*, 187 Fed. 556, 558, 109 C. C. A. 322 (C. C. A. 6th Cir.). True, also, through the removal, the suit was maintained in a federal district of which the defendant was not a resident (*Smith vs. Detroit, T. S. L. R. Co.*, 175 Fed. 508, and cases there cited); but since the parties could and did accept the jurisdiction of the court below (*in re Moore*, 209 U. S. 496, 505, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; *Kreigh vs. Westinghouse & Co.*, 214 U. S., 26, 253, 29 Sup. Ct. 619, 53 L. Ed. 984; *Erie R. Co. vs. Kennedy*, 191 Fed. 332, 334, 112 C. C. A. 76 [C. C. A. 6th Cir.]; *Hubbard vs. Chicago,*

M. & St. P. Ry. Co. [C. C.] 176 Fed. 994, 997; Detroit Trust Co. vs. Pontiac Savings Bank, 196 Fed. 29, 32 (C. C. A. 6th Cir.), the removal cannot be and is not questioned."

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Under the statute, the right of removal, on the ground that the petition presents a case arising under the Constitution or laws of the United States, is not limited to non-residents, but "it may be removed by the defendant or defendants," while under the ground of diverse citizenship of the defendants, it may be "removed by the defendant or defendants therein being non-residents of that State."

97 All of the defendants actually in court at the time when the petition for removal was required, under the statute, to be filed, joined in the petition. At that time no precipice had been filed and no summons had been issued for any of the other nominal defendants, and it would of course, be impossible for the defendants actually in court, to join mere nominal defendants who were not in court, and, as the sequel proved, are not even now in court. The plaintiff could not, by nominally joining other defendants in the suit and making no effort to get them into court, prevent the actual defendants from removing the case.

The petition for removal is required to be filed in the state court at or before the time when the defendants are required to plead to the petition filed in the state court. The petition for removal in this case was filed at that time, and at that time there were no other defendants in court or for whom a summons had been issued, and, indeed, there are now no defendants in court, except those so joined in the petition for the removal. At the time of filing the petition for removal, and now, the Lake Shore and the New York Central were and are the only defendants in the suit, and the plaintiff could not under the authorities by merely naming other defendants in the caption of the bill, but upon whom no attempt was made to secure service of summons, prevent the defendants actually in court from removing the case to the Federal court.

Tremper vs. Schwabacher et al., 84 Fed. Rep. 413; (See p. 416):

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"Under the law, the defendant Louis Schwabacher was obliged to appear and make his defense in the action, without waiting for service upon his co-defendants. Therefore, at the time of filing his petition and bond for removal of the case, he stood alone, as if he were the sole defendant. He could not require his co-defendants to join in a petition for removal, nor claim a stay of proceedings. It cannot be claimed that there is a separable controversy between him and the plaintiff; but, from necessity, he should be allowed to exercise his right to have the case removed, because, as the case stood at the time of the removal proceedings, he was the only defendant. The courts have held that where a defendant who, if sued alone,

98 would be entitled to remove a case into a circuit court of the United States, is prevented from exercising the right by being joined with other defendants not entitled to the privilege, he may, after the disability has ceased, by the case being severed as to his co-defendants, remove the case, even though the time allowed for removal would have been passed if there had been no such disability. *Yulee vs. Vose*, 99 U. S. 539-546; *Cookerly vs. Railway Co.*, 70 Fed. 277-280. By a similar course of reasoning, I reach the conclusion that in a case where several defendants have a right to remove a case, and only one of them is brought within the jurisdiction of the state court, and required to defend, he alone may claim the right. If in one case the departure of the co-defendants who have appeared in court removes the barrier to the right of removal, the absence of co-defendants who have not been brought within the jurisdiction of the state court, at the time when the right of removal must be exercised or waived, should give the same freedom to a defendant, in court, who may desire to exercise the right. The motion to remand will be denied, and the application to amend granted."

Cookerly vs. Great Northern Ry. Co., 70 Fed. 277, was an action in the state court for damages for wrongfully causing the death of the decedent. The action was against The Great Northern Railway, the firm of Shepard, Seims & Company, and the firm of McKenzie & Glenn, all charged with the negligence. The summons

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was not served on Shepard & Seims Company, but was on the other two defendants. On the trial, after the plaintiff's evidence was in each of the defendants moved for non-suit. The court sustained the motion as to the McKenzie & Glenn firm, and while the motion by the Great Northern was under consideration the Great Northern removed the cause, on the ground that it was then the sole defendant, and had the right before final trial (as the law then stood) to remove the cause. The removal was sustained, the court refusing a motion to remand. As no summons was served on Shepard, Seims & Company they were not regarded as in the case so far as it related to the right to remove.

Diday vs. New York, P. & O. R. Co. et al., 107 Federal Rep. 565, was a suit in Crawford County, Ohio, against The N. Y. P. & O. Ry. Co. and The Erie Railroad Company.

99 By the COURT, Judge WING, of this District:

"It has been urged by counsel for the defendant the Erie Railroad Company that the New York, Pennsylvania & Ohio Railroad Company is not in court, and was not in court at the time of filing the petition for removal. The service shown by the return of the sheriff could only have been valid to bring the corporation last named into court upon the theory that it was, as a matter of fact, the lessor, because the only service made was that permitted by the

statute (Section 3305), to-wit, on a servant and employee of the Erie Railroad Company, the lessee. This court cannot pass upon the motion to quash filed in the state court until the cause is removed; but, in considering the question of removal, I think the court has a right to consider all things in the record, one of which is the presence or absence of other defendants in court at the time limited for filing of a petition for removal.

In the case of Tremper vs. Schwabacher, (C. C.) 84 Fed. 413, where two non-citizen defendants were sued, and only one of them was served, and removal papers were filed before answer day, it was held that removal was effected. The court say:—

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'The defendant, L. S., was obliged to appear and make his defense in the action without waiting for service upon his co-defendant. Therefore, at the time of filing his petition and bond for removal of the cause, he stood alone, as if he were the sole defendant. He could not require his co-defendant to join in the petition for removal, nor claim a stay of proceedings. It cannot be claimed that there is a separable controversy between him and the plaintiff, but from necessity he should be allowed to exercise his right to have the case removed, because, as the case stood at the time of the removal proceedings, he was the only defendant.'

"It is clear, upon the state of facts admitted, that the service of summons upon the New York, Pennsylvania & Ohio Railroad Company must have been quashed in the state court whenever action was taken on the motion, and that there was not reason founded upon fact for bringing such corporation before the court by an alias summons served upon any of its officers. But the defendant

100 The Erie Railroad Company could not wait for such inevitable decision without losing its right to remove. In this the case cited is somewhat similar in principle to the one now before the court."

Bowles vs. H. J. Heinz Company et al., 188 Fed. 937, opinion by Judge Lacombe, Circuit Judge:

Syllabus 2.—"Where plaintiff, a resident of New York, sued defendants, residents of Pennsylvania, for malicious prosecution, but only served the corporation defendant, it was no objection to the corporation's right to remove, that the individual defendant not served, did not join in the petition."

By the COURT (page 938):

"There is no separate controversy and there is abundant authority for the general proposition that in such a case one of several defendants cannot remove the cause. I concur, however, with Judge Hanford (Tremper vs. Schwabacher, 84 Fed. 413) in the conclusion that such rule does not apply where only one of two defendants has been served."

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It is quite apparent that the defendants served and in the state court were bound to file their petition for removal at the time required for their appearance in that court. If defendants named but not served could defeat that right then it would be possible for any plaintiff to name a defendant in the petition upon whom no service could ever be made, and thereby keep the case in the state as to the defendants served, and who if sued alone would have the right to remove, and yet the other named defendants never were and never could be served.

It would be no more in the power of a plaintiff to thus defeat removal than it would by fraudulently naming a defendant for the purpose of preventing a removal, and that is condemned by numerous decisions following Plymouth Consol. Gold Mining Co. vs. Amada & S. Canal Co., 118 U. S., 270, where the court says:

"The necessary implication of these authorities is that where fraudulent joinder of resident defendants is alleged in the petition, and the fraud is made out a case is presented in which removal of the case of the non-resident defendant to the Federal court may be sustained."

So that independently of any separable controversy as to these four defendants, (Reed, Evans, Wood and The Central Transportation Company), if they had been served, as they were not served, the 101 other defendants could not be required to waive their right to remove at the time required by law, and the court will hold that these four were not parties and their presence by name in the petition will be ignored.

It would appear, therefore, quite obvious that a serious question does arise in the case under the Constitution and laws of the United States, and therefore, both the Lake Shore and the New York Central were, under the authorities, given the right to remove the case to the Federal court. But not only were these two companies together entitled to remove the suit, but the New York Central

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clearly comes within the provisions of the statutes which would enable it to remove the suit because of diversity of citizenship between it and the plaintiff as to the specific matters in controversy, in which that company alone is shown to have any interest, and in which the petition does not disclose any interest in any other actual or nominal defendant.

The petition discloses that the plaintiff is a corporation and citizen of the State of Maine; that the New York Central Company is a corporation and citizen of the State of New York, and as such, it was entitled to have the opinion of the Federal court as to whether it had been properly brought into court; as to whether such individual action was authorized, and on all questions in which it alone was concerned. It may be that the case as to the New York Central could have been removed to the proper Federal court of New

York, but it will appear from the authorities that under the facts in this case that question could be and has been waived.

In *Mattison vs. Boston & Maine*, 205 Fed., 821, opinion by Judge Ray, N. District, New York; *Stewart vs. C. Lumber Company*, 211 Fed., 343, opinion by Judge Toulmin, Southern District of Alabama; *Park Square Automobile Co. vs. American Locomotive Company*, 222 Fed. Reporter, 979, opinion by Judge Ray, Northern District of New York, it was held that where a suit is brought in the state court of a state (a) by a citizen of a state, (b) against a citizen of a state, (c), the right of removal exists, and the proper district to which the removal is to be had is the District Court of the residence of C. That a plaintiff cannot by bringing his suit in a state court in which neither the plaintiff or defendant resides, deprive the defendant of his right to remove, there being diversity of citizenship and the requisite amount involved.

In the opinion in the *Park Square* case, *supra*, while the real question decided was that a suit commenced in the state court of New Hampshire by a citizen of Maine, against a citizen of New York, could be removed by the defendant into the United States District Court of New York, and denied the motion to remand from that court, Judge Ray says (See page 992 in 222 Fed. Rep.):

"If the procedure clauses in Section 29 of the judicial code are to fix and determine 'the proper district' into which a cause may or must be removed, if removed, I do not see why a cause brought in the state court of a particular state of which neither the plaintiff nor the defendant are citizens or residents may not be removed into the District Court of the United States of that state in which the action is brought, regardless of the residence of the parties thereto. Section 28 says that:

'Any other suit of a civil nature, at law or in equity, of which * * * District courts of the United States are given jurisdiction by this title, and which are now pending, or which may hereafter be brought into any state court, may be removed into the district court for the United States for the proper district by the defendant or defendants therein, being non-residents of that state.'

General original jurisdiction of all suits, where there is diversity of citizenship and the requisite amount in controversy, is given to the United States District courts, as we have seen, and as has been decided by the Supreme Court of the United States again and again. The provision that such a suit must be brought in a particular district, that of the plaintiff or the defendant, 'does not touch the general jurisdiction of the court over such a cause between such parties,' but is for the protection of parties, and 'affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege.' *Interior Construction & Improvement Co. vs. Gibney*, *supra*, 160 U. S., 217, 219, 16 Sup. Ct. 272, 40 L. Ed., 401. It is not essential to this power of removal

that either party reside in the state where the suit is brought in the state court. It is a case within the general jurisdiction

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of the United States District Courts, and may be removed from the state court to the United States District Court."

Independently then of a Federal question presented by the petition, as to the New York Central & Hudson River Railroad Company, this cause was removable, there being diversity of citizenship.

Under Judge Ray's opinion it could be removed to either the District Court of the Northern District of Ohio, or the District Court of the Southern District of New York. Quoting further from Judge Ray his concluding paragraph:

"It is impossible for this court to understand that it was intended by Congress to leave it within the power of a plaintiff to deprive the defendant in a suit brought by such plaintiff of the right to remove the cause into the United States Court for trial by going into a state of which neither party is a resident or citizen and there commence his action, when he could not so deprive the defendant of the right of removal by bringing his suit in the state of the residence of either the plaintiff or the defendant. The statutes relating to the removal of cause should be construed to prevent this result if possible."

The New York Central & Hudson River Railroad Company then had the right to remove, as jurisdiction existed in any district court of the United States.

1. Because it involved an interpretation and application of the laws of the United States, not only because the anti-trust laws of the United States were directly involved, but also as to that company it was entitled to the opinion of this court whether it could, in a personal action against it, be subject to the process of injunction without personal service on it.

2. Because the latter question was personal to it, entirely severable from any other question in the case, and presented a severable controversy.

3. Because of diverse citizenship.

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And whether Judge Ray is right or wrong in his position that the removal could be either to the court in Ohio or in New York, the one the District Court of the state in which the suit is brought, the other the District Court of the state of the residence of defendant, if

104 the removal was to the wrong District Court the plaintiff waived its right to object to the venue by its appearance and its appeal to the court for the exercise of jurisdiction.

Both defendants had the right of removal on the ground that the

case involved a Federal question. If one to the District Court in Ohio, and the other to the District Court in New York, or both to the District Court in Ohio, the court in either district having jurisdiction, the matter is foreclosed by the appearance and consent of plaintiff.

II.

This Court Having General Jurisdiction of the Subject-Matter of the Suit, the Parties Have Waived the Right to Question the Jurisdiction by Their Acts and Have Consented to the Exercise of That Jurisdiction by This Court, and Thereby Waived its Right, if any it had, to Remand.

The question of waiver of jurisdiction over the person of defendants has been very frequently before the Federal courts, and a great variety of opinions have been expressed thereon. The great weight of the authority, however, even in the District and Circuit Courts, is to the effect that if the court in which the case was brought or to which it had been removed, had general jurisdiction of the subject-matter, the question of its jurisdiction over the person of the defendant would be entirely one of procedure and a personal privilege which could be waived, and as stated by the Supreme Court in *United States vs. Hvoslef*, 237 U. S., 1.

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"But assuming that the subject-matter was within the jurisdiction of the court the requirement as to the particular district within which the suit should be brought was but a modal and formal one which could be waived, and must be deemed to be waived in the absence of specific objection upon this ground before pleading to the merits."

It appears from the reported cases, that not a little confusion was created by the language used by Chief Justice Fuller in a dictum in the opinion in the case of *Wisner*, 203 U. S., 459, and which is also apparently the case relied upon by the plaintiff herein, who has evidently been misled by the same dictum, and, no doubt, is unaware of the fact that the Supreme Court has definitely overruled the *Wisner* case on the question of waiver and established the rule 105 in reference to waiver as we claim it.

The first case modifying the doctrine of the *Wisner* Case, is that of *In Re Moore*, 209 U. S., 490, wherein the first paragraph of the syllabus meets the points involved in the present case completely, and is as follows:

"In either case, the filing by the defendant of a petition for removal, the filing by the plaintiff after removal of an amended complaint or the giving of a stipulation for continuance, amounts to the acceptance of the jurisdiction of the Circuit Court."

And the third paragraph of the syllabus states the rule which must necessarily govern now, and is as follows:

"While consent cannot confer on a Federal Court jurisdiction of a case of which no Federal Court would have jurisdiction, either party may waive the objections that the case was not brought in, or removed to, the particular Federal court provided by the statute."

"Nothing in *Ex parte Wisner*, 203 U. S., 449, changes the rule that a party may waive the objection to the jurisdiction in respect to a particular court where diversity of citizenship actually exists."

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The Supreme Court in the opinion, beginning on page 501, reviews many of the authorities beginning with the case of *Gracie vs. Palmer*, 8 Wheat., 699, and going down to the case of *Interior Con. Co. vs. Gibney*, 160 U. S., 217, 219.

A very instructive portion of the opinion, applying to the case at bar, and which holds that the waiver may be by the plaintiff as well as by the defendant, is found on page 506, from which we quote, as follows:

"Several other cases in this court, as well as many in the Circuit Courts and Circuit Courts of Appeal might be noticed, in which a similar ruling as to the effect of a waiver was announced. It is true that in most of the cases the waiver was by the defendant, but the reasoning by which a defendant is precluded by a waiver from insisting upon any objection to the particular United States Court in which the action was brought compels the same conclusion as to the effect of a waiver by the plaintiff of his right to challenge that jurisdiction in case of a removal. As held in *Kinney vs. Columbia*

Saving & Loan Association, 191 U. S., 78, a petition and 106 bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the Federal court, and if when the defendant is brought into a Federal court by the service of original process he can waive the objection to the particular court in which the suit is brought, clearly the plaintiff, when brought into the Federal court by the process of removal, may in like manner waive his objection to that court. So long as diverse citizenship exists the Circuit courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit court or one subsequently removed from a state court, and if any objection arises to the particular court which does not run to the Circuit courts as a class that objection may be waived by the party entitled to make it. As we have seen in this case, the defendant applied for a removal of the case to the Federal court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in that court, and he is,

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equally with the defendant, precluded from making objection to its jurisdiction."

The matter is next referred to by the Supreme Court in the case of *Western Loan & Savings Co. vs. Butte and Boston Con. Mining Co.*,

210 U. S., 368. This was an action brought in the Circuit court by a citizen of Utah against a citizen of New York. The circuit judge dismissed the action for want of jurisdiction, and Judge Day, in the opinion, says:

"Whether that decision was correct is the single question brought directly here by writ of error. The Circuit Court for the District of Montana was without jurisdiction of the action, because neither of the parties to it was a resident of that district, and the statute (25 Stat. 433) requires that where the jurisdiction is founded on the fact that the parties are citizens of different states, suit shall be brought only in the district where one of them resides. But we have recently held that where diversity of citizenship exists, as it does here, so that the suit is cognizable in some circuit court, the objection that there is not jurisdiction in a particular district may be waived by appearing and pleading to the merits. In re Moore, 209 U. S., 490. 107 anything to the contrary said in Ex parte Wisner, 203 U. S., 449, was overruled."

It appears in that case, that the defendant filed a demurrer to the complaint; on the ground that the court had no jurisdiction of the subject-matter; that the court had no jurisdiction of the person of the defendant; that the petition did not state facts sufficient to constitute a cause of action, and that the complaint is uncertain and unintelligible. For the reason that the demurrer invoked a ruling of the court on the merits of the case, the court held the defendant to have waived the right to challenge the jurisdiction of the court over his person, and on page 371, referring to this branch of the case, say:

"It had appeared and filed its demurrer to the original complaint, invoking the judgment of the court, as hereinbefore stated, and the

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court had ruled against it on the question of jurisdiction, and upon the merits of the cause of action, only sustaining the demurrer as to the form of the allegations in the complaint. It invoked and obtained a ruling on the merits so far as the legal sufficiency of the cause of action is concerned. Then the amended complaint was filed. The court sustained its jurisdiction upon hearing the demurrer, which ruling is subsequently changed on the authority of Ex parte Wisner, which is now overruled in In re Moore, in so far as it was said in the Wisner case that a waiver could not give jurisdiction over a person sued in the wrong district, where diversity of citizenship existed."

The question again came before the Supreme Court in the case of Arizona & New Mexico Ry. vs. Clark, 235 U. S., 669. In speaking of this subject, the court, on page 674, say:

"We need spend no time upon these questions, since there is no ground for denying the jurisdiction of the District Court of the

United States over the subject-matter, the objections urged are of such a nature that they might be waived, and the record shows that they were waived by the action of defendant in permitting the cause to proceed in the Federal court, and answering there upon the merits, without objection based upon the grounds now urged or any jurisdictional grounds. The action being one arising under a law of the United States, and the requisite amount being in controversy, the Federal District Court had original jurisdiction under Section 24, judicial code. The removal proceedings were in the 108 nature of process to bring the parties before that court, and the voluntary appearance of the parties there was equivalent to a waiver of any formal defects in such proceedings."

Applying the doctrine set forth in the foregoing opinions, which we assume is now the law of the land, we find that the plaintiff in this case acquiesced in the jurisdiction of this court, and waived its right to remand by entering into the court, filing a stipulation, sub-

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mitting important and material questions by brief to the court, and by filing its several motions invoking the action of the court.

We will not burden the court with the citation of a long array of other authorities, both in the Supreme Court and in the Circuit Court and District Courts, but perhaps it would be proper if in this connection we refer the court to two decisions of the Circuit Court of Appeals of this Circuit, one made in 1907, and when it was supposed that the *Wisner Case, supra*, was controlling, and the other decided in 1909, after the opinion in *Re Moore*.

In *L. & N. Ry. Co. vs. Fisher*, 155 Fed., 68, the court, speaking on this question, and on page 69, say:

"A question of jurisdiction of the court below was suggested by the court growing out of the fact that the plaintiffs were citizens of the State of Mississippi, the Louisville & Nashville Railroad Company, a corporation of the State of Kentucky, and the Pullman Palace Car Company, a corporation of the State of Illinois. The suits were brought in the Circuit Court of Shelby County, Tenn., and removed into the Circuit Court of the United States for the Western District of Tennessee upon the application of the two defendant corporations solely upon diversity of citizenship. Thus the suits were not brought within either the district of the plaintiff or that of the defendants, and, not being a suit which might have been originally brought in the court to which it was removed, was not properly removable to that court from the state court. *Ex parte Wisner*, 203 U. S., 449, 27 Sup. Ct. 150. But the defendant corporations might and did waive any objection which they might have made to being sued in a district of which neither they nor the plaintiff were inhabitants, by themselves removing the suits, and the plaintiff submitted to the jurisdiction thus invoked by failing 109 to object in any way to such removal and by submitting to a trial upon the merits. This consent by both parties to the

jurisdiction takes the case outside the authority of *Ex parte Wisner*, and brings it under *Central Trust Co. vs. McGeorge*, 151 U. S., 129, 14 Sup. Ct., 286, 38 L. Ed. 98, which is recognized in the former

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case as an authority when both parties have submitted to a suit in the district of neither; federal jurisdiction otherwise appearing. *Corwin Mfg. Co. vs. Henrici Washer Co. (C. C.)*, 151 Fed., 938."

A good definition and a definite statement of the rule, as to when parties have waived jurisdiction over their person, in a case similar to the one at bar, and as applied in this circuit, is found in *Erie R. Co. vs. Kennedy*, 191 Fed., 322; wherein on page 334, Judge Denison, referring to this question, says:

"We do not find it necessary to consider what would have been the result if defendant had seasonably raised this question of jurisdiction over its person. Under the familiar rule, that objection is waived unless raised at the first opportunity calling for election between insisting on the objection or taking inconsistent action (*In re Moore*, 209 U. S., 490, 501, *L. & N. R. R. Co. vs. Fisher*, 155 Fed., 68), and we are called upon to apply this rule of waiver."

We are justified in concluding, therefore, that as the action in this case is one in which the Federal court would have concurrent jurisdiction with the state court, the action of the plaintiff in submitting itself to that jurisdiction, and not having raised the question "at the first opportunity calling for election between insisting on the objection or taking inconsistent action," has precluded its right now, if indeed it ever had any, to have the case remanded to the state court.

An instructive opinion to the same effect is found in the case of *Western Union Telegraph Co. vs. L. & N. R. R. Co.*, 201 Fed., 932.

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III.

It is Equally Clear That the Suit was Removable under the Statute Relating to Separable Controversies.

That there are separable controversies involved in the suit is made apparent from a reading of the Bill. The New York Central & Hudson River Company, from any allegations made in the Bill, would not be concerned in the issue that was attempted to be made as between the plaintiff on the one side and the Lake Shore and the four defendants who were not summoned and have not appeared, and which involves the contract with the Reed Committee, on the other. As the case stands in this court, the controversy on that point would necessarily be confined to the plaintiff and the Lake Shore, because the other named defendants are not in court and while the New York Central is an indispensable party

to the issue relating to the consolidation, there are no averments that connect the New York Central, in any manner, with the other transaction. And so it is equally apparent that the four nominal defendants are neither necessary nor proper parties on the issue of the consolidation of the New York Central and the Lake Shore. They do not appear as having any interest whatever in that question. If the allegations in the Bill setting up the ownership by the plaintiff of stock in The New York Central & Hudson River Railroad Company means that the plaintiff is also suing that company to prevent it from going into the consolidation, because, as alleged, it would weaken the value of his New York Central stock, then that clearly would be a separable controversy in which only the plaintiff and The New York Central & Hudson River Railroad Company would be proper parties, or have any interest. So that from any angle from which we view the Bill there is no difficulty in finding the fact that there are separable controversies which would entitle "either one or more of the defendants actually interested in such

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controversies" to remove the suit to the Federal Court, and when, as here, the controversy would be "wholly between citizens of different states" on removal it would carry with it the entire case.

That the latter statement is correct is conclusively shown by the following authorities:

The questions arising under the removal provisions of the Judicial Code and the Act of March 3rd, 1875, as amended by the Act of August 13th, 1888, must be distinguished from those arising under the earlier act of July 27th, 1886, and cases arising under the latter.

Buck vs. Felder, 196 Fed. 421.

Under Section 28, Judicial Code, the following provisions are made as to removal:

(1) "Any suit of a civil nature at law or in equity arising under the Constitution or laws of the United States or treaties made 111 or which shall be made under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district."

(2) "Any other suit of a civil nature at law or in equity, of which the district courts of the United States are given jurisdiction by this title, * * * may be removed into the District Court of the United States for the proper district by the defendant or defendants therein being non-residents of that State."

(3) "And when in any suit mentioned in this Section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants, actually interested in such controversy

may remove said suit into the District Court of the United States for the proper district."

(4) "Provides for the removal on the ground of local prejudice.

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This is not important here except that it provides: 'That if it further appear that the suit can be fully and justly determined as to the other defendants in the state court without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said District Court may direct the suit to be remanded, so far as relates to such other defendants to the state court to be proceeded with therein.'

This last paragraph is cited to show that in all of the four provisions, the whole case is removed, and only in case of removal on account of local prejudice can the District Court remand a part of it.

In New England Water Works Company vs. Farmers Loan & Trust Co., 136 Fed., 521, Circuit Court of Appeals, 7th Circuit, it is said, (page 525):

"The parties to this separable controversy therefore, having such diversity of citizenship as permits of removal, and the controversy being removed by a party entitled to make the removal the whole foreclosure suit came with it into the court below. The arguments at bar, in this connection lost sight of the difference in the language employed in the statute in relation to removal of separable controversies and the language relating to removals generally. True it is that to remove a case from state into the Federal courts on account of the diversity of citizenship, the defendant—that is to say as interpreted by the Supreme Court all the defendants—must join in the removal. On the contrary, the removal of a separable controversy may be effected by 'one or more of the defendants.'

The above case also clearly establishes that there is a separable controversy here.

In Barney vs. Latham, 103 U. S., 205, Book 26 L. P. Ed. 515, it was held, in a case removed on the ground of separable controversy:

"We are of opinion that upon filing of the petition and bond by the individual defendants in the separable controversy between them

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and the plaintiffs, the entire suit, although all of the defendants may have been proper parties thereto, was removed to the Circuit Court of the United States, and that the order remanding it to the State Court was erroneous."

The opinion in the above case explains the difference between the Act of 1866 under which it was held that only the separate controversy could be removed, the act of March 2nd, 1867, and the act of March 3rd, 1875 holding that under the later act:

"There is nothing whatever justifying the conclusion that Congress intended to leave any part of a suit in the State Court where the right of removal was given to and was exercised by any of the parties to a separable controversy therein."

That plaintiff here could not prevent removal by uniting distinct causes of action in the petition in the State Court, which would be multifarious, is also disposed of, by stating that plaintiffs can make no such claim, and the court say:

"They are not in any position to say that that right does not exist because they have made those defendants who were not proper parties to the entire relief asked. The fault, if any, in pleading was theirs, under their mode of pleading, whether adopted with or without a purpose to affect the right of removal, accorded by the 113 statute, the suit presents two separate controversies, one of which is wholly between individual citizens of different states and can be fully determined without the presence of other party defendants."

Plaintiff's Brief.

In the brief filed by plaintiff in connection with the motion to remand he cites seven cases in support of the motion, and to these we want, briefly, to refer.

The Wisner case, 203 U. S. 449, has already been disposed of showing that as to the point involved here that case has been overruled.

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Smith vs. Lyon, 133 U. S., 315, was an action originally brought in the Federal court solely on the ground of diverse citizenship, and in which it was held that an action by two partners, one a citizen of the Eastern District of Missouri, the other of Arkansas, and the defendant a citizen of Texas, could not be brought in the Eastern District of Missouri for the reason that the several plaintiffs must each be competent, under the diverse citizenship provision, to sue in the Federal court. This case would have no application to the questions made on the motions to remand.

The Puget Sound Sheet Metal Works vs. Great Northern Railway Company, 195 Fed., 350, decided by the District Court of Washington, is in direct conflict with cases cited herein from 205 Fed., 821; 211 Fed., 343 and 222 Fed., 979, and was also a case of diversity of citizenship and it held that a suit by plaintiffs who are citizens of different states against a defendant which is a citizen of a state other than the one in which the suit is brought cannot be removed under the judicial code where plaintiff resists such removal, but the court, citing the Moore case, says:

"The opinion in that case reviews a long line of Supreme Court decisions holding that the exemption of parties from being required to litigate controversies elsewhere than in the District in which they reside is a privilege which may be waived and is waived by invok-

ing the jurisdiction of a United States Court, or by voluntarily participating in litigated proceedings in a court which might have been ousted of jurisdiction by objections taken in due time and reaffirms those decisions * * * in the Moore case it was held that the defendant consented to accept the jurisdiction of the United States

114 Court by filing a Petition for removal thereto from the State Court, and that after removal the plaintiff, instead of challenging the jurisdiction of the United States Court by a motion to remand filed an amended petition in that court, signed a stipulation giving defendant time to answer, and then both parties entered into stipulations for a continuance of the trial in that court."

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Cound vs. A. T. & S. Ry. Co., 173 Fed., 527; Whittaker vs. Illinois Central R. R. Co., 176 Fed., 130, and Newell vs. The B. & O. R. R. Co., 181 Fed. 698, are all cases under the Employers' Liability Act of Congress based on a Federal statute, and in each it was correctly held that the action could only be maintained in the District of which the defendant was a resident. They admitted, however, the right of defendant to waive the objection that the suit was not in the proper district. (See p. 532 of 173 Federal, and p. 130 of the 176th Federal.)

Macon Grocery Company vs. Atlantic Coast Line, 215 U. S., 501, was a suit brought by shippers to enjoin a railroad company from putting the tariff schedule into effect.

It was held:

"The Circuit Court in the District of which the defendant is not an inhabitant has not jurisdiction of a case arising under the Constitution and laws of the United States, even though diverse citizenship exists, the plaintiff resides in the District, and the cause be one alone cognizable in a Federal Court."

Pleas to the jurisdiction in that suit were promptly filed by the defendant, and the Supreme Court in affirming the order of the Court of Appeals says:

"Pleas to the jurisdiction of the Circuit Court having been seasonably made should have been sustained and the Bill dismissed without prejudice for want of jurisdiction over the persons of the defendants."

The facts in that case are in no wise similar to those in the case at bar. No one would question the right of the plaintiff here to have brought his suit, originally, in this court, as against the Lake Shore and The New York Central, and especially if he could have secured the appearance of the latter Company. If the suit had been brought against the Lake Shore alone it could hardly be questioned that the Lake Shore would have the right to remove the case on the ground of the existence of a Federal question.

Joseph W. Jackson and General Investment Company, Plaintiffs, vs.
The Lake Shore & Michigan Southern Railway Company and
William K. Vanderbilt, Defendants.

A motion to remand was filed in this case, similar to the one filed in the action brought by the General Investment Company alone, and as the argument and authorities advanced in the other case will apply with equal force in this action, we will do nothing more here than to put the court in possession of the facts as they appear from the record.

This action was brought, as was the other, by stockholders of the Lake Shore, one owning 23 shares and the other owning the same 5 shares set up in the first suit. The action purports to be one against William K. Vanderbilt, and the sole prayer of the petition is for a judgment of \$1,360,747.46 against that defendant for the benefit of The Lake Shore & Michigan Southern Railway Company. The action assumes to be based upon substantially the same facts set out in the first case, charging the defendant Vanderbilt with being instrumental in bringing about an illegal consolidation of these railroads, and as a consequence of such consolidation, the payment by The Lake Shore Company of the several fees necessary to be paid to the Secretaries of State and to the Public Utilities Commissions, aggregating the amount named in the prayer. It will thus appear that the basis of the action is the alleged illegality of the consolidation, and the petition in this case itself, informs us wherein it claims such consolidation to be illegal.

After a general statement of the case, the petition proceeds as follows:

"Plaintiffs say that said agreement of consolidation so illegally entered into by said directors, including said Vanderbilt, was illegal and ultra vires of The Lake Shore and New York Central Companies in many respects, among which, in brief are the following:

(a) It provided for consolidation and merger of normally competing lines of railroad engaged in both inter and intrastate commerce,—all in violation of the common law, of the Sherman Act, so called, and the Clayton Act, so called, of the United States, 116 and the Anti-Trust Acts of the various States in which said railroads are located, and of the Anti-Trust constitutional provisions of said states.

* * * * *

(c) In so doing not only provided for illegal restrictions and restraints of trade to the detriment of the stockholders of The Lake Shore Company, including these plaintiffs, and of the Company itself, but also exposed property of the Lake Shore Company to the impositions of heavy fines and penalties provided for in such cases by said laws."

In order for the plaintiff to recover, if he had the necessary parties in the proper court, he would be required to show the alleged acts in violation of the Federal statute as justifying his claim for a judgment against the individual defendant for the amount of fees paid in connection with the consolidation.

The case was brought in the state court and service attempted to be secured on Mr. Vanderbilt by attachment; and in due time, a petition for removal was filed and allowed, and a transcript of the record from the state court was duly filed in this court on March 5th, 1915. On March 13th, a motion was filed by defendant Vanderbilt, to discharge the order of attachment, which had been issued by the state court. On March 16th, brief was filed on behalf of defendant Vanderbilt, in support of the motion to discharge the attachment, and on the brief was endorsed: "Service acknowledged. Henry, Fauver, McGraw & Thomsen," the latter appearing as attorneys of record for the plaintiffs in the state court.

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On or about March 23rd, the plaintiffs filed an elaborate brief with this court in opposition to the motion to discharge. On April 2nd, the following entry was made on the Journals of this court:

"The plaintiffs consenting, leave is hereby granted to the Lake Shore & Michigan Southern Railway Company, to file answer, demurrer or other pleading herein, within sixty days after April 4th, 1915,"

and this entry was marked: "Approved, Henry, Fauver, McGraw & Thomsen, Solicitors for plaintiffs."

On or about September 17th, this court, after due consideration, found the motion of the defendant to be well taken, and the same was granted and an order entered vacating the attachment, and nothing further was done in the case by the plaintiff until the filing of this motion to remand on October 30th, 1915.

117 If the plaintiffs originally had any right to have the cause remanded, their action in consenting to an extension of time to answer, and in submitting and arguing the motion to discharge the attachment certainly amounted, under the authorities heretofore cited, to a waiver of such right.

They cannot test the question of the validity of the attachment, and then after an adverse holding, retreat from this court. Had the decision been in their favor, there would be no motion to remand. If they were not satisfied to submit to the jurisdiction of this court their duty was to object at the first opportunity presented. It is of no moment that the plaintiffs asked the court to take no affirmative action. They permitted action to be taken, and tried to have it in their favor.

This court having set aside the order of attachment, and as the defendant Vanderbilt was only in court through that process, the effect of that order was to eliminate the defendant Vanderbilt from the case and leave only the Lake Shore as the sole defendant.

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In this condition, it is apparent that the action would stand as brought by the plaintiffs, one a citizen and resident of New York and the other of Maine, against the Lake Shore, a corporation of Ohio, and the action could therefore, have been properly brought in this court, as against that sole defendant. The case being one which arose under the Constitution and laws of the United States and the petition itself disclosing the existence of this Federal question, the Lake Shore would have been authorized under the Federal Statute, to remove the case as was the defendant Vanderbilt.

We do not deem it necessary to reiterate the points made in the brief preceding, because it will readily appear that the same points are equally applicable to this case.

The service as to the defendant Vanderbilt, having been set aside, the case now stands in this court as one against the Lake Shore alone, and under the authorities cited, we submit that the motion to remand should be overruled.

In Conclusion.

We submit, therefore, that we have established the following propositions:

1. That the cases are removable on the ground that they arise under the laws of the United States and are therefore, properly removable by the petitioners for removal.
- 118 2. That there are separable controversies and the proper diversity of citizenship which would authorize and sustain the removal.
3. That the Lake Shore is now the only real or actual defendant in both cases and on the ground of the existence of a Federal question, and also by reason of diversity of citizenship the actions could have been brought in this court in this State, the residence of the Lake Shore; and, because of the Federal question the Lake Shore would be entitled to removal.
4. The record clearly discloses that the plaintiffs have by their acts consented to, and also invoked, the exercise of jurisdiction by this particular court, and now after that court has acted, and the court hav-

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ing general jurisdiction of the subject-matter, the right to remand, assuming that any existed, has been waived.

We submit, therefore, that the motions to remand should be overruled, and that for the reasons set forth in our former Brief the motion of the Lake Shore to dismiss the General Investment Company case should be granted.

DOYLE, LEWIS, LEWIS & EMERY,
Solicitors for Defendants.

WALTER C. NOYES,
SAML. H. WEST,
CHAS T. LEWIS, *Counsel.*

119 *Memorandum Opinion on Motions to Remand.*

Filed March 28, 1916.

KILLITS, J.:

In each case the motion to remand must be denied. Plainly, in each, an important and essential issue arises under the laws of the United States. Complainants insist that the object of their respective action is, to quote from the complaint in the first case, to prevent "an illegal combination for the restraint of inter and intra-state trade and commerce, and trade and commerce with foreign nations above referred to," and to specialize the issue, it is repeatedly averred that the proposed action of defendants sought to be prevented, or overthrown, is of a character to be "a violation of the Federal so-called Sherman Anti-Trust Act, and the Clayton Act, so-called (said last named act being an act of Congress approved October 15, 1914) and other Federal Laws." Each is a case, therefore, of the issue, in which "a question to which the judicial power of the Union is extended by the Constitution forms an ingredient," and it is consequently removable, although the only defendant in court may be a resident of the district. Railroad Company vs. Mississippi, 102 U. S. 135, 141. Complainant in each case has made The Lake Shore and Michigan Corporation a resident corporation, a party defendant. The right to remove, as well as the right to demand a remand, is to be determined in these cases by the terms of the respective complaints. The fact that complainants have chosen to join a resident corporation as party defendant takes each of these cases out of that class where, because both complainants and defendants are all non-residents of the district, jurisdiction in the Federal Court, by removal from the State Court, depends upon the consent of the complainant. Decisions like that of Western Union Telegraph Company vs. Louisville & Nashville Railroad Company, et al., 201 Federal Reporter, 932, have, therefore no application here.

JOHN M. KILLITS,
*U. S. District Judge.*120 *Order Overruling Motion to Remand.*

Entered March 28th, 1916, by Judge Killits.

This day this cause came on to be heard on the motion of plaintiff to remand this cause to the Court of Common Pleas of Cuyahoga County, Ohio, and was submitted to the Court on briefs of all parties; on consideration thereof the Court denied said motion, to which ruling of the Court plaintiff, by its attorneys, excepts.

Memorandum Opinion on Motion to Dismiss.

Filed April 4, 1916.

KILLITS, J.:

Heretofore the court quashed the service attempted to be had upon the defendant, The New York Central and Hudson River Railroad Company, a New York corporation having no place of business or agent within the district, and since the beginning of the action, the consolidation of railroad lines which was sought in this action to be restrained, has been accomplished.

The matters now before the court are involved in four motions:

1. Of the Lake Shore and Michigan Central Railway Company to dismiss the bill;
2. Of the plaintiff for substituted service upon The New York Central and Hudson River Railroad Company;
3. Of the plaintiff for substituted service on other corporations;
4. Of the plaintiff for leave to file a supplemental bill.

If it were not for the fourth motion the first three would find ready disposition.

The issues in the bill, so far as control of the court's judgment on the first three motions are concerned, are substantially those of the Spencer cases involving a similar attack upon 121 the proposed consolidation, and which were considered by this court and that of the Eastern District of Michigan, to the end that they were each dismissed because The New York Central and Hudson River Railroad Company was an indispensable party.

The original bill is clearly in *personam* and the real thing in it—the direction of the whole action—is toward restraining the exercise by The New York Central and Hudson River Railroad Company of its powers incident to its ownership of a majority of the stock of The Lake Shore and Michigan Southern Railway Company; the action would proceed to just as effective relief to complainant, had no other defendant been named save the New York corporation, and service could be had upon it. It seems at least reasonably clear that the inclusion of the other defendants in the case was only to give an appearance of jurisdiction here. It is the New York corporation which is the real object of complainant's attack, the real and only indispensable defendant to the attempt to make a cause of action.

So construing the bill, we are clear that, but for the attempt to enlarge the record with a supplemental bill, the motion to dismiss should be allowed, and the second and third motions disallowed. (Minnesota vs. Northern Securities Co., 184 U. S. 199-235; Talbot J. Taylor & Co. vs. Southern Pacific Co., et al., 122 Fed. 147-152.) The same conclusion is unavoidable whether we regard complainant in its capacity as a shareholder in the Lake Shore or in the New York Central. In either case its attack is upon the New York Central.

Therefore these motions are determinable with the fourth, and all

the questions bear upon that involving the right to file a supplemental petition.

We are unable to restrain a feeling that the impulse to file a supplemental bill was a desire to get into this jurisdiction if any possible means could be found and to avoid confinement to the obviously open forum of the residence of the real and only indispensable party defendant to the alleged cause of action. Why complainant is so persistent in attempting to bring the New York corporation to bay elsewhere than in New York is a matter only for curious speculation, of course; its rights are to be otherwise measured. At the same time, however, the situation is not one to justify a strain upon construction to gratify its desires, especially in face of the record that it brought into this controversy with deliberation, and that it holds an interest in it which not only approximates the irreducible minimum, 122 but which is in danger of no ponderable damage, should its efforts fail.

Whether the fourth motion should be granted depends on the question whether a supplemental bill is in fact offered. In *Mellor vs. Smithers*, 114 Fed. 116, Judge Shelby, speaking for the Fifth Circuit Court of Appeals, said (p. 120):

"The correct decision of this case turns on the question whether or not the plaintiff at the time he filed his bill had a cause of action. If he had no cause of action then, he cannot, by amendment or supplemental bill, introduce a cause of action that accrued thereafter, even though it arose out of the same transaction that was the subject of the original bill. 1 Beach, Mod. Eq. Prac., Sec. 496; *Straughan vs. Hallwood*, 30 W. Va. 274, 4 S. E. 394; 8 Am. St. Rep. 29; *Hill vs. Hill*, 10 Ala. 527. But where a cause of action exists at the filing of the bill which is defectively presented by the bill, the defects may be remedied by amendment (Equity Rules, 28, 29), and matters occurring after the filing of the bill may be presented by supplemental Bill (Equity Rule 57); *Jenkins v. Bank*, 127 U. S. 484, 486, 8 Sup. Ct. 1196, 32 L. Ed. 189; *Hoxie v. Carr*, 1 Sumn. 173, Fed. Cas. No. 6,802). Where material facts have occurred subsequent to the beginning of the suit, the court may give the plaintiff leave to file a supplemental bill, and where such leave is given the court will permit other matters to be introduced into the supplemental bill which might have been incorporated in the original bill by way of amendment. *Stafford v. Howlett*, 1 Paige, Ch. 200. But, in cases where the plaintiff had no cause of action when the bill was filed, neither amendment nor supplemental bill presenting occurrences subsequent to the filing of the bill can prevent its dismissal."

It is important to notice, that aside from a desire to consummate jurisdiction in this court, there is no occasion for a supplemental bill. If the action on the original complaint had found service upon the indispensable party defendant, against whom a decree such as complainant demanded could have been had, there would have been no need for the supplemental bill; all proceedings by that party defendant pendente lite the effect of which would have been to render

futile the decree would have been to no avail; all such transactions would have been under the cloud of the suit and, as purely incidental to effecting the decree, their results would have been 123 avoided had a decree been reached on the lines of the prayer of the bill.

But, in order to avoid the weakness of the original bill to hold the New York corporation to this jurisdiction, it is found necessary to change the character of the action from one in personam to one in rem. The difference between the two pleadings in that respect is clear. The complaint sets up a transitory action; the supplemental sets up a local action. No one could be heard to say that section 57 of the Judicial Code had any relation to the action as originally brought; it is not argued by counsel for complainant that The New York Central and Hudson River Railroad Company could be brought in under the original bill by applying the provision of Section 57; now, however, upon the supplementary bill, Section 57 is invoked to support substituted service asked for.

If as Simpkins says, as quoted by counsel for complainant, the supplemental bill "is in effect an original bill, beginning, as it were, a new suit," and that seems to be the effect of the change from an action in personam to one in rem; that seems to be the result of the appeal to section 57, then it is difficult to find standing here for complainant. For the first time in the supplemental bill is indicated a suit "to remove any encumbrance or lien or cloud upon the title to real or personal property" within this district; there was nothing of that in the original bill, and we are not unmindful of its allegation that the consummation of the proposed consolidation would so operate, and the prayer therein that, if the consolidation should be affected pendente lite, the same be set aside. The original bill proceeded purely in personam. The effort to plead a provision for a contingency did not change the character of the action. The facts upon which the action was predicated indicated only a personal and transitory right of action, if any.

We are, therefore, confronted with the question whether complainant is qualified to bring such an action as that attempted in the supplemental bill. In order to invoke the provisions of Sec. 57, complainant avers that the consolidation has clouded the title of the Lake Shore Company to its property within the State of Ohio, which cloud complainant seeks to have removed.

It is plain that complainant finds this right of action under Section 11901, General Code of Ohio. In fact counsel for complainant substantially argue for the application of that statute as the 124 support of their cause of action; and it is impossible to find any other authority to bring such an action in this court respecting Ohio property. But Section 11901 limits the right of action to "a person in possession" against a person out of possession claiming an adverse estate or interest in the property. The supplemental petition informs us that The New York Central Railroad Company, a corporation not made a party to the cases, is in possession of the Lake Shore's property in Ohio; certainly the General Investment Company is not.

This supplemental bill, considered as an original bill to remove clouds upon title, must also fail for want of a ~~real~~ party defendant in interest. It is the new corporation, The New York Central Railroad Company, which claims the adverse interest, according to the new pleading; paragraph *d* of the prayer thereof asks "that said defacto corporation, The New York Central Railroad Company, be ousted from its possession acquired pending this action, and from its claim of title to the property in this district," etc., yet complainant is not asking that this corporation, the only party possible to be held under Sec. 11901, be made a party to this suit. It is the old corporation, The New York Central and Hudson River Railroad Company, which is sought to be brought in by substituted service. The supplemental complaint does not show that this corporation now has any interest in the Lake Shore's Ohio property adverse to either the Lake Shore or the General Investment Company, in its capacity as a stockholder in either company. A decree in this case as it is now planted, if all the parties named were in court, would be ineffective to remove the clouds complained of without having the new corporation before the court, and having the new corporation in as a defendant, a complainant having a right to begin the action under the Ohio statute, as one in possession, would be under no necessity to include any of the other defendants in the case, because a decree denying the claims and interests of The New York Central Railroad Company would be the undoing of everything of which plaintiff complains.

Recurring to the rule announced in *Mellor vs. Smither*, *supra*, it seems clear that if it is plain that in the original bill no cause of action, either well or defectively pleaded, was shown against The New York Central and Hudson River Railroad Company of a character which would warrant drawing it from its own jurisdiction into another by joinder with parties resident in the other,

125 then no supplemental complaint, as distinguished from an amended complaint, may be filed which could be effective to bring the non-resident defendant in as a party to the original case. As to it, the supplemental complaint must be examined as an original pleading; its interpretation and effect are not to be had and judged by the assistance of a reference to the original.

These considerations result in these propositions: 1. The original complaint, only, pleads a cause of action against The New York Central and Hudson River Railroad Company; 2. The other defendants named therein were neither indispensable nor necessary parties to that cause of action. They may have been proper parties, but certainly it cannot be that parties who can be said to have no other relation to the cause of action than as "proper" but not necessary or indispensable parties, may be included in the case, and because they, only, are resident within the court's territorial jurisdiction, indispensable non-resident parties may be compelled to enter the case on substituted service; 3. The supplemental complaint sets up a cause of action to which The New York Central and Hudson River Railroad Company is neither an indispensable nor necessary party; 4. This supplement presents nothing which suffices to so enlarge the record

that a right to bring this railroad company into this jurisdiction was created.

The effect of all this is the conclusion that the supplemental complaint, so far as The New York Central and Hudson River Railroad Company is concerned, must be treated as an original complaint, wherefore the motion to serve it by substituted process must be determined by consideration of the original complaint alone, because, treating the supplement as an original complaint, the right of the complainant to bring an action to remove clouds, etc. as there attempted, has no existence under the controlling law, Section 11901, Ohio Code.

The views this court entertained in the Stevens case, which are equally applicable here, demand that the motion for an order for substituted service be denied. The original bill sets up a cause of action against this defendant which is not within Section 57, Judicial Code.

The allowance of the filing of a supplemental petition is a matter of discretion; we hold to the view that the discretion is a narrow or limited one, the application seldom to be refused; however, 126 it still seems to us to have expansion enough to permit, and in this case to require us to refuse to allow the filing of a supplemental pleading which seeks, by the changing of the form of action, to accomplish by indirection, what in the original bill it could not do directly, and which attempts a cause of action which complainant has no capacity to bring. That permission to file the supplemental bill should be refused we entertain no doubt.

The view we entertain that complainant cannot bring an action to remove the alleged clouds upon the Lake Shore's Ohio property compels refusal of an order for substituted service on the other corporations.

We are now to consider the motion of the Lake Shore Company to dismiss the case. Holding the view that The New York Central and Hudson River Railroad Company is an indispensable party, this motion should be allowed because that party is not in court.

April 1, 1916.

JOHN M. KILLITS,
U. S. District Judge.

Order Dismissing Cause.

April Term A. D. 1916, to-wit: April 8th, 1916.
Present: Honorable John M. Killits, U. S. District Court.

This cause came on for hearing upon the following motions filed by the complainant herein; Motion for substituted service upon The New York Central and Hudson River Railroad Company. Motion for leave to file a supplemental bill herein. Motion for substituted service upon certain parties named as defendants in said proposed supplemental bill, and also, upon motion of the defendant, The Lake Shore & Michigan Southern Railway Company, to dismiss the bill, all of which motions are in writing and filed herein.

127 The court heard the arguments of counsel, orally and by briefs on each of said motions, and now having carefully considered the same, and being fully advised, finds that each and all of the said motions filed by the complainant, above referred to, should be and the same are hereby denied and overruled.

And the court being fully satisfied that the said motion of The Lake Shore & Michigan Southern Railway Company to dismiss the bill herein filed, is well taken and should be granted, it is ordered, adjudged and decreed, that said bill of complaint and this suit be and the same is hereby dismissed at the costs of complainant, and that The Lake Shore and Michigan Southern Railway Company recover of complainant, its costs herein expended, to be taxed according to law.

To each and all of the said orders, judgments and decrees above mentioned, the complainant, General Investment Company, excepted and does now except.

Petition for Appeal.

Filed May 18, 1916.

The above named plaintiff conceiving itself aggrieved by the final decree made and entered on the 6th day of April, 1916, and the interlocutory orders theretofore made in the above entitled cause, does hereby appeal from said orders and decree to the United States Circuit Court of Appeals for the Sixth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said orders and decree were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

FREDERICK A. HENRY,
Of HENRY, FAUVER, McGRAW &
THOMSEN,
Solicitors for Plaintiff.

No. 1324 Citizens Building, Cleveland, O.

128 The foregoing claim of appeal is allowed. Bond \$250.00.
JOHN H. CLARKE,

Dated May 19th, 1916.

District Judge.

Assignment of Errors.

Filed May 18, 1916.

And now, upon the 18th day of May, A. D. 1916, comes the said complainant, by its solicitor, Frederick A. Henry, of Henry, Fauver, McGraw & Thomsen, No. 1324 Citizens Building, Cleveland, Ohio, and says that the interlocutory orders and final decree in said cause are erroneous and against the just rights of said complainant for the following reasons:

First. The court erred in not sustaining the motion of the General Investment Company to remand the cause to the Court of Common Pleas of Cuyahoga County, Ohio, from whence it came.

Second. The court erred in not holding that for want of proper venue this suit was unlawfully removed from the Court of Common Pleas of Cuyahoga County, Ohio, to the United States District Court for the Northern District of Ohio, Eastern Division, upon the joint petition of the defendants The Lake Shore and Michigan Southern Railway Company, a citizen and resident of Ohio, and an inhabitant of said District, and The New York Central and Hudson River Railroad Company, which was not a citizen of Ohio, (The New York Central Railroad Company, which was not a party, also joining therein) alleging that the suit was one of a civil nature in equity arising under the laws of the United States and of which the district courts of the United States are given original jurisdiction under the act approved March 3, 1911, title "The Judiciary," and also 129 that in said suit and as between said petitioning defendants and the plaintiff, which is a citizen and a resident of the State of Maine, there was a controversy wholly between citizens of different states and which could be fully determined as between them.

Third. The court erred in holding that this being a suit in which an essential issue arises under the laws of the United States, the fact that complainant had chosen to join a resident corporation as party defendant, takes the case out of the class where, because both complainant and defendants are all non-residents of the district, jurisdiction in the federal court by removal from the state court depends upon the consent of the complainant; and the court further erred in failing to hold that, jurisdiction of the district court having been invoked on the ground that the suit involves an essential issue of federal law, or on that ground together with the diverse citizenship aforesaid, the suit could neither be brought in, nor removed to, the district court, unless the indispensable defendants, and all of them, were inhabitants of such district.

Fourth. The court erred in sustaining the motion of The New York Central and Hudson River Railroad Company to set aside the service of summons upon it by the sheriff of Cuyahoga County, Ohio.

Fifth. The court erred in holding that the service of summons in Cuyahoga County, Ohio, by the sheriff of that county, upon W. A. Barr as a regular ticket agent of The New York Central and Hudson River Railroad Company was insufficient to effect the general appearance of said defendant to this suit in the district court.

Sixth. The court erred in not holding that when the service of summons upon The New York Central and Hudson River Railroad Company had been set aside, said company thereafter entered its general appearance by its joinder in the signing of "Brief in Opposition to Remand,—Doyle, Lewis, Lewis & Emery, Solicitors for Defendants," filed December 1, 1915.

Seventh. The court erred in dismissing the bill or petition of General Investment Company, and in sustaining the motion of The Lake Shore and Michigan Southern Railway Company for each dismissal.

Eighth. The court erred in holding that The New York Central and Hudson River Railroad Company was an indispensable party defendant and that without service upon said defendant no relief against The Lake Shore and Michigan Southern Railway Company could be awarded to the complainant.

130 Ninth. The court erred in not sustaining the motion of the General Investment Company for substituted service upon The New York Central and Hudson River Railroad Company.

Tenth. The Court erred in not sustaining the motion of the General Investment Company for leave to file a supplemental bill.

Eleventh. The court erred in not sustaining the motion of the General Investment Company for substituted service on the new defendants proposed to be made by the supplemental bill and on the original defendants, other than The New York Central and Hudson River Railroad Company, not otherwise served.

Twelfth. The court erred in holding that The New York Central and Hudson River Railroad Company was the real and only indispensable defendant to the attempt to make a cause of action, whether complainant be regarded in its capacity as a shareholder in The Lake Shore and Michigan Southern Railway Company or in The New York Central and Hudson River Railroad Company.

Thirteenth. The court erred in holding that the supplemental bill which was tendered by complainant, and which invoked the provisions for substituted service in section 57 of the Judicial Code, had no relation to the action as originally brought, so as to warrant the granting of leave to file such supplemental bill.

Fourteenth. The court erred in holding that the possession of the property in question within the Northern District of Ohio had been so transferred pendente lite from The Lake Shore and Michigan Southern Railway Company to The New York Central Railroad Company by the acts sought by the original bill to be enjoined; that the plaintiff, as a stockholder of the former company, could not maintain such pending suit by substituted service as one to quiet the title of the former company to said property under favor of section 11,901 General Code of Ohio.

Fifteenth. The court erred in holding that to the original bill The New York Central and Hudson River Railroad Company was, and The Lake Shore and Michigan Southern Railway Company was not, an indispensable party; and that to the tendered supplemental bill The New York Central and Hudson River Railroad Company was not, and The New York Central Railroad Company was, an indispensable party.

131 Sixteenth. The court erred in holding that the original and the supplemental bills do not, nor does either of them, set up a cause of action against The New York Central and Hudson River Railroad Company under section 57 of the Judicial Code.

Seventeenth. The court erred in holding that complainant could not bring action to remove the alleged clouds upon The Lake Shore and Michigan Southern Railway Company's Ohio property.

Wherefore, the said complainant, General Investment Company, prays that the said orders and decree of the District Court of the United States for the Northern District of Ohio, Eastern Division, be reversed and that such directions be given and decree made in respect to the matters herein referred to in favor of this complainant as prayed for in its several motions and pleadings hereinbefore mentioned, with costs to be taxed.

GENERAL INVESTMENT COMPANY,
By FREDERICK A. HENRY,
OF HENRY, FAUVER, McGRAW &
THOMSEN,
Its Attys.

1324 Citizens Bldg., Cleveland.

Order Allowing Appeal.

April Term, A. D. 1916, to-wit, May 22nd, 1916.

Present:

Honorable John H. Clarke, U. S. District Judge.

On petition of Henry, Fauver, McGraw & Thomsen, solicitors and of counsel for plaintiff, General Investment Company:

It is Ordered that an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the decree heretofore filed and entered herein on the 6th day of April, 1916, be and the same hereby is allowed, and that a certified transcript of the record in accordance with the rules and practice for the courts of equity of the United States as promulgated by the Supreme Court of the United States November 4th, 1912, forthwith be transmitted to said United States Circuit Court of Appeals.

It Is Further Ordered that the bond on appeal be fixed in the sum of \$250.00.

Bond on Appeal.

Filed May 29, 1916.

Know all men by these presents, that we, General Investment Company as principal, and American Surety Company as surety are held and firmly bound unto The Lake Shore and Michigan Southern

Railway Company, Central Trust Company of New York, New York Central and Hudson River Railroad Company, William A. Read, Henry Evans, and Willis D. Wood, in the full and just sum of Two Hundred and Fifty Dollars to be paid to the said The Lake Shore and Michigan Southern Railway Company, Central Trust Company of New York, New York Central and Hudson River Railroad Company, William A. Read, Henry Evans, and Willis D. Wood, their certain attorneys, executors, administrators, successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally; by these presents. Sealed with our seals and dated this 27th day of May in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a session of the District Court of the United States for the Eastern Division of the Northern District of Ohio in a suit pending in said Court, between said General Investment Company and said The Lake Shore and Michigan Southern Railway Company, Central Trust Company of New York, New York Central and Hudson River Railroad Company, William A. Read, Henry Evans and Willis D. Wood, Number 287 in Equity, a decree was rendered against the said General Investment Company and the said General Investment Company having obtained allowance of its petition for appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the Lake Shore and Michigan Southern Railway Company, Central Trust Company of New York, The New York Central and Hudson River Railroad Company, William A. Read, Henry Evans and Willis D. Wood, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the 133 & 134 Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the — day of — next.

Now the condition of the above obligation is such, that if the said General Investment Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

GENERAL INVESTMENT COMPANY,
By Its Solicitor **FREDERICK A. HENRY.**

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By **M. STANLEY BROWN,**
Resident Vice President.

Attest:

HOWARD C. WILLIAMS,
Resident Assistant Secretary.

Sealed and delivered in presence of
H. E. DOWNING,
VERNON E. DAVIS.

Approved:
JOHN H. CLARKE,
United States District Judge.

Citation.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To The Lake Shore & Michigan Southern Railway Company, Central Trust Company of New York, New York Central and Hudson River Railroad Company, William A. Read, Henry Evans, and Willis D. Wood, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit on the *28th day of June next, pursuant to a petition for appeal filed in the Clerk's office of the District Court of the United States for the Northern District of Ohio, wherein General Investment Company is appellant and you are appellees to show cause, if any there be, why the decree rendered against the said appellants as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 29th day of May in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America the one hundred and fortieth.

JOHN H. CLARKE,
Judge of the District Court.

*Not exceeding 30 days from day of signing.

Service of the above citation is hereby acknowledged and appearance of _____ is hereby entered.

June —, 1916.

U. S. Marshal's Return.

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

Received this writ at Cleveland, Ohio, on June 1, 1916, and on June 2nd, 1916, at the same place I served it on S. H. West, Attorney of record for the within named, The Lake Shore and Michigan Southern Railway Company, Central Trust Company of New York, New York Central and Hudson River Railroad Company, William A. Read, Henry Evans and William D. Wood, personally, a true and certified copy hereof with all endorsements thereon.

CHARLES W. LAPP,
U. S. Marshal,
By AL P. KELLEY,
Deputy.

Marshal's Fees:

Service	\$2.00
Travel06
	<hr/>
	\$2.06

Filed June 5, 1916. B. C. Miller, Clerk U. S. District Court, N. D. O.

137 *Decree and Mandate of United States Circuit Court of Appeals for the Sixth Circuit.*

(Filed April 29, 1918.)

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Ohio, Greeting:

Whereas, lately in the District Court of the United States for the Northern District of Ohio, before you or some of you, in a cause between General Investment Company, plaintiff, and The Lake Shore & Michigan Southern Railway Company, Central Trust Company of New York, New York Central & Hudson River Railroad Company, William A. Read, Henry Evans and Willis D. Wood, defendants, a decree was entered April 8th, 1916, in favor of said defendants and against said plaintiff, as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord, one thousand nine hundred and seventeen, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby affirmed in part and reversed in part as stated at length in the opinion this day filed and the cause is remanded to the said District Court for further proceedings not inconsistent with this opinion. The plaintiff will pay two-thirds of the costs of the appeal.

February 16th, 1918.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the twenty-sixth day of April in the year of our Lord one thousand nine hundred and eighteen.

WILLIAM C. COCHRAN,
*Clerk of the United States Circuit Court
 of Appeals for the Sixth Circuit.*

Costs to be divided:

Clerk	\$37.60
Printing Record	157.10
Attorney	20.00
	<hr/> \$214.70

139 *Memorandum Opinion of the Circuit Court of Appeals.*

(Filed April 29, 1918.)

Submitted April 10, 1917.

Decided February 16, 1918.

Before Warrington and Knappen, Circuit Judges, and Sanford, District Judge.

This suit was commenced by a petition in equity filed in the Court of Common Pleas of Cuyahoga County, Ohio, by the Central Investment Company, a Maine corporation, against The Lake Shore & Michigan Southern Railway Company, a corporation of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois (hereinafter called the Lake Shore Company) The New York Central & Hudson River Railroad Company, a New York corporation (hereinafter called the New York Central Company), the Central Trust Company of New York, and three individual defendants, Read, Evans and Wood, for the primary purpose of enjoining the consolidation of the Lake Shore and New York Central Companies, with others, into a single corporation. Summons was issued for the Lake Shore and New York Central Companies and returned as served upon each. No process was issued for the Trust Company or individual defendants; and they have never appeared herein. Before the return day the New York Central Company appeared specially and moved that the sheriff's return upon it be set aside. This motion was overruled; as was the plaintiff's motion for a temporary injunction.

Thereafter, the Lake Shore and New York Central Companies, with The New York Central Railroad Company (purporting to be the consolidated railroad corporation created meanwhile under the laws of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois), appeared specially and filed their petition for the removal of the cause to the United States District Court below. This removal was ordered by the Common Pleas Court.

After such removal, the New York Central Company, appearing specially in the District Court, moved to set aside the return of the

summons against it and quash the service. The Lake Shore Company also moved to dismiss the plaintiff's petition. After a hearing on the motion of the New York Central Company it was adjudged that the service and summons against it be set aside, and that 140 it go hence, with costs. Subsequently the plaintiff moved for leave to file a supplemental bill making new parties defendant; also for "substituted process" upon the New York Central Company and others. More than two months thereafter the plaintiff moved that the cause be remanded to the state court. This motion was denied. Subsequently a decree was entered denying the plaintiff's motion for substituted service, and leave to file a supplemental bill; granting the Lake Shore Company's motion to dismiss; and dismissing the suit at the plaintiff's costs; from which final decree the plaintiff has appealed.

1. Motion to Remand.—The petition for removal, which alleged diversity of citizenship between the plaintiff and all defendants and the requisite jurisdictional amount, was primarily based on a separable controversy with the removing defendants arising under the laws of the United States. The plaintiff, while not denying the general grounds of Federal jurisdiction, insists that the suit was improperly removed to the District Court because of want of local jurisdiction in such court due to the fact that the New York Central Company was not an inhabitant of the district.

It is unnecessary to determine whether, under the rule of *Ex parte Wisner*, 203 U. S., 449, *In re Moore*, 209 U. S., 491, *Louisville Railroad vs. Fisher* (6th Cir.), 155 Fed. 68, *Turk vs. Illinois Central Railroad* (6th Cir.), 218 Fed. 315, and other similar cases, there was, in the first instance, a want of local jurisdiction in the court below. If general Federal jurisdiction exists, the want of local jurisdiction or venue in the particular Federal court to which a cause has been removed, is waived, where the plaintiff, after the removal, without challenging such jurisdiction by motion to remand or otherwise, consents to and accepts such jurisdiction by affirmative acts in recognition thereof and submission thereto. *In re Moore*, 209 U. S., *sup.*, at p. 496; *Western Loan Co. vs. Mining Co.*, 210 U. S., 368, 371; *Kreigh vs. Westinghouse*, 214 U. S., 240, 253; *Louisville Railroad vs. Fisher* (6th Cir.), 155 Fed. *sup.*, at p. 69; *Garrett vs. Louisville Railroad* (6th Cir.), 197 Fed., 715. Such objection to the want of venue must be raised at the first opportunity calling for election between insisting on the objection or taking inconsistent action. *Erie Railroad vs. Kennedy* (6th Cir.), 191 Fed., 332, 334.

141 In the instant case, the plaintiff, after the removal, without anywise challenging the jurisdiction of the District Court, entered into an agreement as to using therein certain testimony relating to validity of the service upon the New York Central Company; participated in the hearing therein on the motion to set aside such service; and subsequently, more than a month after such service had been set aside and while the Lake Shore Company's motion to dismiss was pending, filed therein its motion for leave to file a sup-

plemental bill, and two motions for "substituted process" upon the New York Central Company and others, under sec. 57 of the Judicial Code. These several acts on its part were clear and unequivocal recognitions of the jurisdiction of the District Court, indicating its willingness that the matters in controversy should be tried by that court; its motions for leave to file a supplemental petition and for "substituted process" not merely tacitly consenting to accept its jurisdiction, but affirmatively appealing to its aid, and invoking the exercise of such jurisdiction. *In re Moore*, 209 U. S. sup., at p. 496; *Clark vs. Southern Pacific Company* (C. C.), 175 Fed. 122, 127. Such consent to the jurisdiction of the District Court and waiver of objection to its want of venue, if any originally existed, could not thereafter be revoked; and the motion to remand, filed more than two months thereafter, was hence properly denied. *In re Moore*, 209 U. S. sup.; *Clark vs. Southern Pacific Co.* (C. C.), 175 Fed. sup.

2. Service on the New York Central Company.—The sheriff of Cuyahoga County made return that he had served the summons on the New York Central Company upon "W. A. Barr, Regular Ticket Agent, in charge of the business of said company, the president or other officer not found in my county." The motion of the New York Central Company to set aside this service, was based primarily upon the grounds that it had never done business in Ohio or become subject to service of process therein, and that Barr was not its agent or in charge of its business.

A foreign corporation is not amenable to personal process in a court of another state unless it is doing business in such state and such process is served upon an authorized officer or agent. *Peterson vs. Chicago Railway*, 205 U. S. 364, 390, 394; *Mechanical Appliance Co. vs. Castleman*, 215 U. S. 437, 441; *Herndon-Carter Co. vs. Norris*, 224 U. S. 496, 499; *Philadelphia Railway vs. McKibbin*, 243 U. S. 264, 265; and cases therein cited. To render it so amenable there must be an actual doing of business within the state of such character and extent as to warrant the inference that it has subjected itself to the jurisdiction and laws of such state and is there present subject to the process of its courts. *St. Louis Railway vs. Alexander*, 227 U. S. 218, 226, 227; *International Harvester Co. vs. Kentucky*, 234 U. S. 579, 583, 586; *Washington-Virginia Railway vs. Real Estate Trust*, 238 U. S. 185, 186; *Philadelphia Railway vs. McKibbin*, 243 U. S. sup., at p. 266. The validity of the service of process in a state court may, furthermore, be questioned after removal to a Federal court; the sheriff's return not being conclusive and the question of jurisdiction being one for the ultimate determination of the Federal court. *Mechanical Appliances Co. vs. Castleman*, 215 U. S. sup., at 441, 442, 443; and cases therein cited.

The testimony established the following material facts: The New York Central Company was a New York corporation. It had no line of railroad in Ohio and maintained no office or place of business therein. Both it and the Lake Shore Company were members

of a group or system, comprising several railroad companies included under the general designation of the "New York Central Lines." Each of these several companies commonly marked its rolling stock and equipment with its own initials and the words "New York Central Lines"; issued its tickets on paper water marked with these words; printed them on its time-tables; and generally used them as a trade mark on available matter. The same person was President of the New York Central and Lake Shore Companies. The New York Central Company's railroad connected at Buffalo, New York, with that of the Lake Shore Company, forming a continuous line from New York City to Chicago, Illinois, extending through Cleveland, in Cuyahoga County, Ohio. Through passenger rates were, by agreement, established over these connecting lines; and passenger trains run over them from Cleveland and western points to New York City, without change of passenger cars. The Lake Shore Company maintained a city ticket office in Cleveland, on the door of which the words "New York Central Lines" were painted. It there sold coupon tickets for continuous passage

over its line and those of the New York Central Company to 143 points on the latter. These tickets recited that they were issued by the Lake Shore Company and that in selling tickets for passage over other lines it acted only as agent. They bore at the top the name of the New York Central Company, for the purpose of validating them as authorized tickets issued by the Lake Shore Company on account of the New York Central Company. Their date stamp read: "New York Central Lines (date of issuance) City Ticket Office, Cleveland, O." They were honored by the New York Central Company for the transportation of passengers from Buffalo to the points of destination; and upon an accounting the New York Central Company received from the Lake Shore Company the proportionate part of the fares collected for the transportation over its lines; and so, reciprocally, as to like tickets issued by the New York Central Company for transportation to points on the lines of the Lake Shore Company. The Lake Shore Company had also, by agreement with other railroad companies throughout the country not included in the "New York Central Lines," established through passenger rates to various points on the lines of such other companies, and regularly issued coupon tickets for continuous passage to such points; which were in all respects similar to those issued for passage to points on the New York Central and other "New York Central Lines," bearing likewise the name of the company on whose line the point of destination was located, and were honored by these other companies and accounted and settled for in exactly the same manner. W. A. Barr was employed as City Ticket Agent of the Lake Shore Company in its Cleveland office. He was not in the employment of the New York Central Company, received no compensation from it, and did not report or account to it; all accounting and settlements being made between the two companies. As such ticket agent, he regularly sold coupon tickets, as above described, for passage over the lines of the Lake Shore and of the

New York Central Company and other companies not included in the "New York Central Lines."

From these facts it appears that the New York Central Company itself transacted no business in Ohio. The plaintiff's contention that it was nevertheless engaged in business therein, through the agency of the Lake Shore Company as an affiliated member of the "New York Central Lines" and in the sale of tickets in its behalf,

and that Barr thereby became its agent for the service of

144 process, is directly ruled by *Peterson vs. Chicago Railway*,

205 U. S. sup., at p. 394, which, in its essential facts, is almost identical with the instant case. There a domestic and a foreign railroad corporation, owning lines of railroad which connected at the state line, were associated as constituent elements of the "Rock Island System," advertised as such in their time-tables and elsewhere. The foreign corporation owned the majority of the stock in the domestic corporation, with the power of controlling its management through the election of directors and officers. The domestic corporation, however, transacted its business within the state as a separate legal entity, under the control and management of its own officers and agents. And, although the two companies had to a certain extent common agents and employees, their control and payment was kept distinct while engaged in the separate service of each. It was held, under these circumstances, that the foreign corporation was not, in the purview of the law, doing business within the state, either through the agency of the domestic corporation or otherwise; that a ticket agent employed by the domestic corporation in selling tickets good upon its own line and that of the foreign corporation, transacted such business as the agent of the domestic corporation merely; and that an attempted service of process upon such ticket agent was not a service upon an agent of the foreign corporation transacting its business within the state in such sense as to give jurisdiction over it.

The doctrine of this case was recently re-affirmed and emphasized in *Philadelphia Railway vs. McKibbin*, 243 U. S. sup., at p. 288, in which it was held that the sale by a local carrier within a state of through tickets over the line of a foreign connecting carrier did not involve a doing of business within the state by such connecting carrier, otherwise, "nearly every carrier in the country would be 'doing business' in every state"; and that even if the defendants' "subsidiary companies" did business within the state, this would not, under the authority of the *Peterson* case, warrant a finding that it did business there.

The case of *St. Louis Railway vs. Alexander*, 227 U. S. sup., at p. 228, upon which the plaintiff mainly relies, is essentially different from the instant case. There two foreign railroad corporations,

whose lines were combined together as a continuous line

145 under the designation of the "Cotton Belt Route," maintained in the state in which suit was brought against one of the constituent corporations, a joint office of the "Cotton Belt Route" and of both constituent lines, with a joint freight agent of the two lines, who, as the authorized agent of the defendant, attended to

the settlement of claims against it and presumably other matters of a kindred character, undertaking to act for and represent it, and negotiating directly for and in its behalf; a situation which was held to constitute a transaction of business in behalf of the defendant by its authorized agent in such manner as to bring it within the state and make it subject to the service of process. Here, however, the essential element of an authorized resident agent, directly acting for and representing the defendant in the conduct of its business, is entirely lacking.

We hence necessarily conclude, under the foregoing authorities, that the New York Central Company was not, in the purview of the law, doing business in Ohio; that the service of the summons upon Barr was not upon an agent transacting its business therein in such sense as to give jurisdiction over it; and that the court below correctly set aside such service and summons and adjudged that it go hence.

We therefore need not consider the alternative contention of the New York Central Company, that in any event the service upon Barr was invalid, under sec. 11288 of the General Code of Ohio, because not made upon him in a county in which its railroad was located or through which it passed.

3. Appearance by the New York Central Company. Four months after the service on the New York Central Company had been set aside, and before the determination of the Lake Shore Company's motion to dismiss, the plaintiff filed its motion to remand to the state court. It now insists in this Court (evidently for the first time), that a certain brief, which appears in the transcript without explanatory evidence, but was apparently submitted in the court below in opposition to this motion, was submitted by counsel in behalf of the New York Central Company as one of the co-defendants, and constituted a voluntary appearance by it. This brief dealt with motions to remand the present case and another case in which the Lake Shore Company, but not the New York Central Company, was a defendant, and was entitled in both cases. It was signed as "Solicitors for defendants" by the counsel who had previously represented the

146 New York Central Company on its motion to set aside the service; who then represented the Lake Shore Company in opposition to the motion to remand, and also, it appears, on its pending motion to dismiss the present case. In discussing the right to remove the present case before service of process upon all defendants, it was stated that both at the time of filing the petition for removal and then, the Lake Shore and New York Central Companies "were and are the only defendants in the suit." On the other hand, it was elsewhere distinctly stated that the court had indicated by its previous order that the New York Central Company was never legally a defendant "and is not now a defendant in the action," which "now stands as one brought against the Lake Shore alone"; in the concluding summary it was repeated that "the Lake Shore is now the only real or actual defendant in both cases"; and in the last sentence, it was urged, not only that the motion to remand should be overruled, but that, for the reasons set forth in their former brief,

the motion of the Lake Shore Company to dismiss this case (which was based primarily upon the absence of the New York Central Company as an indispensable party), should be granted.

Viewing this brief in its entirety, in the light of the existing situation and of its manifest purposes, we think the reasonable inference is that it was submitted by these solicitors in behalf of the Lake Shore Company alone, the only defendant then before the court, and not submitted, or intended to be, in behalf of the New York Central Company, thereby not merely reinstating it as a defendant, after succeeding, four months before, by a vigorous contest, in obtaining its dismissal, but also destroying the principal ground of the Lake Shore Company's motion to dismiss, upon which they were then insisting; the plural word "Defendants" with which it was signed having been used, it would seem, either through inadvertence or typographical error, or as indicating their representation of the Lake Shore Company as the defendant in the two cases. We hence conclude that it did not constitute a voluntary entry of appearance by the New York Central Company herein.

4. Dismissal of Original Petition.—The original petition was filed December 8, 1914. Its broad allegations, so far as now material, may be thus summarized: The plaintiff had been the owner, since 147 June 27, 1914, of 5 shares of \$100 each of the capital stock of the Lake Shore Company, out of a total outstanding issue of 499,961 shares; and, since February 24, 1914, of 300 like shares of the capital stock of the New York Central Company, out of a total of 2,555,810.66 shares. The Lake Shore Company, had, for many years, owned a majority or all of the capital stock of various other railroad and transportation companies incorporated under the laws of New York, Pennsylvania, Ohio, Indiana and Illinois. The New York Central Company had, for many years, owned, in violation of law, a majority, namely 452,892 shares, of the capital stock of the Lake Shore Company; and a majority or all of the capital stock of other railroad and transportation companies incorporated under the laws of Michigan and New York. The several subsidiary companies whose controlling stock was thus held by the Lake Shore and New York Central Companies owned various lines which were parallel and naturally competing with those of the Lake Shore, New York Central and other subsidiary companies, in local, interstate and foreign commerce. Their control had been acquired in order to restrain such commerce and suppress competition therein, and had accomplished such purpose; and if the Lake Shore Company continued its holding of the controlling stock in its subsidiary companies its property and corporate entity would be subjected to penalties and forfeitures under various provisions of law. The New York Central Company, through its own stock ownership and that of the Lake Shore Company and by the election of directors, dominated and controlled, directly and indirectly, the affairs and management of the Lake Shore Company and of each of their several subsidiary companies; thereby concentrating such control in one ownership. To further perfect this combination it had deposited its stock in the Lake Shore Company to

secure an issue of its collateral trust bonds, under an indenture contemplating the consolidation of the two companies, and had executed a mortgage securing an issue of its consolidation bonds to be used in retiring such collateral trust bonds. And as a final step in illegally consolidating the Lake Shore and New York Central Companies, the boards of directors of the New York Central and Lake Shore Companies and of their subsidiary companies had recently signed a proposed agreement of consolidation (the date of which was not recited), contemplating a merger of all of such companies.

148 By its terms these several companies were to be consolidated in a single corporation, styled 'The New York Central Railroad Company, having a capital stock of 3,000,000 shares of \$100 each, the majority of which was to be issued in exchange for stock in the consolidating companies; the stock held by the New York Central Company in the Lake Shore Company was to be cancelled; the minority stockholders in the Lake Shore Company were to receive for each of their shares five shares in the consolidated corporation, aggregating 235,345 shares; and the Lake Shore collateral trust bonds were to be exchanged for equal amounts of the consolidation bonds of the New York Central Company. This proposed consolidation of companies owning parallel and competing lines of railroad was a violation of the Federal Anti-trust Act and of various provisions of the constitutions and laws of the several states, and otherwise illegal; and if approved by the stockholders of the several companies inextricable confusion would result, a multiplicity of annulment suits would be required, and penalties and forfeitures would rise against the companies. At a meeting of the stockholders of the New York Central Company, held July 20, 1914, the consolidation had been approved by a vote of two-thirds of the outstanding stock; the plaintiff having voted and protested against it. A meeting of the stockholders of the Lake Shore Company had been called for December 22, 1914 (two weeks after the filing of the petition), and the New York Central Company would, unless restrained, vote its controlling stock in the Lake Shore Company in favor of the consolidation. After this meeting had been called the defendants, Read, Evans and Wood, acting as a committee for minority stockholders in the Lake Shore Company, had instituted litigation to enjoin the proposed consolidation; whereupon such litigation had been settled and dismissed and the Lake Shore Company had entered into an illegal agreement with the committee and the Central Trust Company by which the committee was to deposit with the Trust Company minority stock for which the Lake Shore Company was to pay \$500 per share, and an additional sum of \$200,000.

The plaintiff filed its petition in behalf of itself and all other similarly situated stockholders in the Lake Shore Company joining therein, and, alleging that it had no adequate remedy at law, prayed: that the New York Central Company be enjoined from voting 149 its stock in the Lake Shore Company in favor of the consolidation agreement, or otherwise, and the Lake Shore Company enjoined from counting such stock or permitting it to be voted; that

the Lake Shore Company be enjoined from entering into the proposed agreement and consolidation, and from making any consolidation whatever with the New York Central Company unless both were divested of their control of subsidiary companies; that the Lake Shore Company be enjoined from purchasing its stock from the Read Committee, and any acquisition thereof decreed illegal and void; that receivers be appointed of the stock owned by the Lake Shore Company in its several subsidiary companies, and the same placed in the hands of independent trustees or sold, or their competitive management otherwise assured; that a receiver be appointed of the equity of the New York Central Company in the stock of the Lake Shore Company, and the same placed in the hands of independent trustees to be managed in the interest of the Lake Shore Company in competition with all other lines; that the New York Central Company be enjoined from issuing its consolidation bonds in exchange for Lake Shore collateral trust bonds; that if, pending the action, the proposed consolidation should be effected, the same be set aside; and for general relief.

The motion of the Lake Shore Company to dismiss, which was directed to the entire petition, was based primarily upon the ground that the New York Central Company was an indispensable party, materially interested in the relief prayed, whose rights were so involved that a determination of the cause without its appearance would be inconsistent with equity; also, in general terms, upon want of equity on the face of the petition, and adequacy of remedy at law.

(1) It is a general rule in equity that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it; that the court may be enabled to make a complete decree, prevent future litigation, and make it certain that no injustice is done, either to the parties before it or to others interested in the subject matter, by a decree granted upon a partial view of the real merits. *Gregory vs. Stetson*, 133 U. S. 379, 586; *Minnesota vs. Northern Securities Co.*, 184 U. S. 199, 235; *Story's Eq. Plead.*, sec. 72.

150 No court can adjudicate directly upon the rights of a person who is not actually or constructively before it. *Mallow vs. Hinde*, 12 Wheat. 193, 198; *Shields vs. Barrow*, 17 How. 129, 140; *Gregory vs. Stetson*, 133 U. S. sup., at p. 586; *Taylor vs. Southern Pacific Co. (C. C.)*, 122 Fed. 147, 152 (Lurton, Circuit Judge). Nor can it make a decree between the parties before it which necessarily affects the rights of an absent person; who is, in such case, an indispensable party. *Shields vs. Barrow*, 17 How. sup., at p. 141; *Barney vs. Baltimore City*, 6 Wall. 280, 284; *Gregory vs. Stetson*, 133 U. S. sup., at p. 587; *New Orleans Water Works vs. New Orleans*, 164 U. S. 471, 489; *Waterman vs. Bank Co.*, 216 U. S. 33, 48. And it is hence the established practice of courts of equity to dismiss a bill, even *sua sponte*, if it appears that to grant the relief prayed would injuriously affect persons materially interested in the subject matter who are not parties to the suit. *Minnesota vs. Northern Securities Co.*, 184 U. S. sup., at p. 235.

A bill is not, however, to be dismissed in its entirety because of the absence of a person who is indispensable to granting all the relief prayed, if there is any separable matter as to which complete relief may be given, not affecting the rights of such absent person. *New Orleans Water Works vs. New Orleans*, 164 U. S. sup., at p. 480 (inferentially); *Waterman vs. Bank Co.*, 215 U. S. sup., at p. 49; *Davis vs. Davis* (C. C.), 89 Fed. 532, 538. And see: *Judicial Code*, sec. 50 (formerly R. S. 737); *Cole Mining Co. vs. Water Co.*, 1 *Sawy.* 470, 6 Fed. Cas. 67, and *Cole Mining Co. vs. Water Co.*, 1 *Sawy.* 685, 6 Fed. Cas. 72.

Applying these principles to the instant case, it is clear that the New York Central Company was an indispensable party to granting so much of the relief prayed as sought to enjoin it from voting its stock in the Lake Shore Company, and, in effect the same thing, to enjoin the Lake Shore Company from counting such stock or permitting it to be voted; to appoint a receiver of its equity in such stock and direct the disposition and management thereof; and to enjoin it from issuing its consolidation bonds in exchange for Lake Shore collateral trust bonds: the relief sought as to each of these matters being of a character which, necessarily, would directly affect its rights and property interests, and hence under the well settled rules above stated, could not be granted by the court in its absence. A stockholder in a corporation is an indispensable party to a suit seeking to enjoin him from voting his stock at a stockholders' meeting. *Taylor vs. Southern Pacific Co.* (C. C.), 122 Fed. sup., at p. 152.

The Read Committee if not the Trust Company also, were, furthermore, indispensable parties to granting so much of the relief prayed as sought to enjoin the Lake Shore Company from carrying out its agreement with them for the purchase of its stock and to set aside any acquisition thereof. *Gregory vs. Stetson*, 133 U. S. sup., at p. 585; *New Orleans Water Works vs. New Orleans*, 164 U. S. sup., at p. 479; *Lengel vs. Smelting Co.* (C. C.), 110 Fed. 19, 22.

The New York Central Company was not, however, an indispensable party to so much of the petition as sought to enjoin the Lake Shore Company itself from entering into the proposed consolidation; which was alleged to be illegal under various provisions of law, entirely independent of the ownership and voting of the controlling stock held by the New York Central Company. In a suit by a stockholder to enjoin a corporation in which he holds stock from entering into an illegal merger with another corporation, such other corporation need not be made a party; its interest being entirely remote. *Blatchford vs. Ross*, 54 Barb. (N. Y.) 42, 47. When the original petition was filed the consolidation agreement had not been made effective by vote of the stockholders of the Lake Shore Company, as required by sec. 9028 of the General Code of Ohio. Therefore the New York Central Company had acquired no vested contract right in the proposed consolidation; and its mere expectancy that the Lake Shore Company would enter into such agreement was a wholly prospective interest, of a remote and non-justiciable character, which did not entitle it to be heard, in the capacity of a con-

tracting party, in litigation seeking to enjoin the Lake Shore Company from entering on its own account, into such consolidation, or render it an indispensable party thereto. Nor was it indispensable to such litigation in its capacity as a stockholder in the Lake Shore Company; that company itself under the well settled general rule, representing its individual stockholders in the defense of suits involving its corporate rights and functions. *Taylor vs. Southern Pacific Co. (C. C.)*, 122 Fed. sup., at p. 153. And see *Blatchford vs. Ross*, 54 Barb. (N. Y.) sup., at p. 48.

152 So too the New York Central Company was not an indispensable party to so much of the petition as sought the appointment of a receiver of the stocks held by the Lake Shore Company in its subsidiary companies, and decrees for their disposition and management; the indirect interest of the New York Central Company in these matters as a stockholder in the Lake Shore Company being likewise represented by that Company.

The motion to dismiss was, however, directed to the entire petition. It was formerly an established rule of equity practice that a demurrer to an entire bill must fail if any part of the bill was good against it, although if limited to the defective parts of the bill it would have been sustained. *Livingston vs. Story*, 9 Pet. 632, 658; *Buffington vs. Harrey*, 5 Otto 99, 100; *Marshall vs. Vicksbury*, 15 Wall. 146, 149; *Pacific Railroad vs. Missouri Railroad*, 111 U. S. 505, 520; *Stewart vs. Masterson*, 131 U. S. 151, 158; *Duckworth vs. Appostalis (D. C.)*, 208 Fed. 936, 937. And since the promulgation of equity rule 29, abolishing demurrers to bills in equity and substituting therefore motions to dismiss, it necessarily follows that such motions are to be governed by a like rule of practice. Applying this rule, we are of opinion that as the petition included matters as to which the New York Central Company was not an indispensable party, the trial court was in error in granting, on the ground of its absence, the broad motion to dismiss the entire original petition. Since, however, the court might properly have dismissed, *sua sponte*, for want of indispensable parties, so much of the original petition as related to enjoining the New York Central Company from voting its stock in the Lake Shore Company, appointing a receiver of its equity therein, directing the disposition and management thereof, enjoining it from issuing its consolidation bonds in exchange for Lake Shore collateral trust bonds, and so much as related to enjoining the Lake Shore Company from counting such stock or permitting it to be voted and from carrying out its agreement with the Read Committee in reference to the purchase of stock and setting aside the acquisition thereof, we find—*independently of the question of whether "substituted service" should have been granted upon the New York Central Company, which will be hereinafter considered*—no error in so much of the decree of dismissal as related to these portions of the original petition: except that, such dismissal

153 being for lack of indispensable parties and not touching the merits, the decree of dismissal should be modified so as to be without prejudice. *Swan Land Co. vs. Frank*, 148 U. S. 603, 612; *Hyams vs. Old Dominion Co. (D. C.)*, 209 Fed. 808, 811.

Since, however, the New York Central Company was not an indispensable party to so much of the original petition as sought an injunction against the Lake Shore Company from entering into the consolidation, the appointment of a receiver of the stocks owned by it in its subsidiary companies, and decrees for their management and disposition, it follows that in so far as the degree of dismissal related to those matters and awarded all unadjudged costs against the plaintiff, it was not warranted merely on account of the absence of that company, and unless sustainable upon other grounds, must be reversed.

(2) As to various reasons urged by the defendants in argument as grounds upon which the original petition should have been dismissed for want of equity, our conclusions are:

(a) As the petition did not disclose the dates upon which the consolidation agreement had been signed by the boards of directors of the various companies, it did not appear therefrom that the plaintiff had bought its stock in the Lake Shore Company after such agreement had been signed by its directors and in contemplation of the consolidation. In this respect the instant case differs from Continental Securities Co. vs. Interborough Co. (D. C.), 207 Fed. 467, 470, which was determined after proof, at final hearing. (b) It did not appear from the face of the petition that the plaintiff had bought such stock merely for the purpose of instituting litigation and compelling the defendants to buy their peace. (c) The amount of such stock, namely, five shares, was not so inconsiderable and trifling in value that the plaintiff should, on that ground, be denied such equitable relief as it might otherwise be entitled, as matter of right, to receive: especially as its petition was also filed in behalf of other stockholders similarly situated, some of whom, if the suit had proceeded with, might, for aught then appearing have joined and shared its benefits. In this respect also the instant case differs from Continental Securities Co. vs. Interborough Co. (D. C.), 207 Fed. sup., in which a single stockholder stood before the court as plaintiff at the final hearing; and now more nearly presents the

154 situation in that case as originally decided upon demurrer. Continental Securities Co. vs. Interborough Co. (D. C.), 165

Fed. 945, 956. And see, generally, as to the right of a single stockholder to interpose for the prevention of an ultra vires and illegal act by the corporation in which he is a stockholder: 2 Cook on Corporations (7th Ed.), sec. 669, p. 2152; and cases therein cited. (d) Nor is relief to be denied on the ground that the allegations of the original petition did not comply with the requirements of equity rule 27 as to bills brought by stockholders against a corporation. This rule relates only to suits "founded on rights which may properly be asserted by the corporation," in which the stockholders' rights are indirect and derivative merely, and has no application to a suit brought by a stockholder against the corporation seeking, in his own direct right, to enjoin it from doing an illegal act. See, inferentially: Dickinson vs. Traction Co. (D. C.), 114 Fed. 232, 242. It

is hence unnecessary to determine whether the petition sufficiently complied with the provisions of this rule; or whether, in any event, this rule refers merely to suits commenced in the Federal courts, or applies as well to suits removed from state courts; a question upon which there is a conflict of opinion. See Hopkins' Fed. Eq. Rules, 149; and cases therein cited.

Furthermore, while we are unmindful that, since the hearing in this Court, it was decided in Paine Lumber Co. vs. Neal, 244 U. S. 459, 471, that a private person could not maintain a suit to enjoin a violation of the Federal Anti-Trust Act, under the provisions of its fourth section, it is clear, as a rule of pleading, under the authorities hereinabove cited, that the broad motion to dismiss the entire petition for want of equity would not have been properly grantable, upon this ground, as to so much of the petition alone as sought to enjoin the proposed consolidation on account of violation of this act.

(3) It is further urged that the motion to dismiss should have been granted, for adequacy of remedy at law, by reason of the fact that sec. 9034 of the Ohio General Code provides that a stockholder who refuses to convert his stock into that of a consolidated company shall be paid the highest market value thereof during the two years preceding the making of the agreement for the consolidation by the directors, if he had previously so required. This statute, whose prime purpose was evidently to provide just compensation
155 to a stockholder dissenting from a consolidation lawfully made, does not, in our opinion, provide an adequate remedy for a stockholder who seeks in advance to restrain the corporation from entering into an illegal consolidation. Furthermore this ground of the motion likewise could not, in any event, apply to the entire petition.

5. Denying Leave to File Supplemental Bill.—The material allegations in the supplemental bill which the plaintiff moved for leave to file, may be thus summarized: The stockholders of the Lake Shore Company had, after the filing of the original petition, held, on December 22, 1914, the meeting to consider the agreement of consolidation, dated April 29, 1914. At such meeting the consolidation agreement had been approved, over the protest of the plaintiff and other minority stockholders; 459,379 out of 459,461 shares, including the 452,892 shares held by the New York Central Company and illegally voted by it, voting therefor. Pursuant thereto, the consolidation agreement had been executed by the officers of the several consolidating companies; the organization of the new corporation, the New York Central Railroad Company (hereinafter called the Consolidated Company), resulting therefrom, had been perfected; and it then claimed to be a consolidated railroad company organized under the laws of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois. The consolidation agreement had been filed in the office of the Secretary of State of Ohio, thereby pretending to transfer all the property of the Lake Shore Company in the northern district of Ohio to the Consolidated Company, which then illegally possessed and claimed, as successor in title, all of the property

of the Lake Shore Company situated in the district, consisting of its line of railroad, with the real and personal property appurtenant, extending from the Pennsylvania line through Cuyahoga and other counties in Ohio. Pending the suit and pursuant to the consolidation agreement, the Consolidated Company had executed to trustees two mortgages covering the real and personal property of the Lake Shore Company, to secure certain issues of bonds from which the Lake Shore Company had received no benefit, thereby pretending to create liens upon the real and personal property of the Lake Shore Company within the district, to an amount exceeding \$365,000,000.00; and had also executed to a trustee an indenture purporting to constitute a charge upon all the earnings and profits of 156 the Lake Shore Company. The officers of the several consolidating companies, including the New York Central and Lake Shore Companies, claimed that by reason of the consolidation the corporate existence of these companies had been merged in that of the Consolidated Company; that their officers were *functi officio*; and that the title to all of their property had passed to it. The nine railroad companies entering into the consolidation with the New York Central and Lake Shore Companies and the trustees under said mortgages and indentures were citizens of other states than Maine. The consolidation agreement and all proceedings and instruments therein set forth, were illegal and void for the reasons set forth in the original petition, but constituted an apparent incumbrance and cloud upon the title to the property of the Lake Shore Company within the district. Wherefore the plaintiff prayed: that the Consolidated Company, as a *de facto* corporation, the nine other railroad companies embraced in the consolidation, and the trustees under the mortgages and indenture executed by the Consolidated Company, be made parties defendant; that, on behalf of the Lake Shore Company, its lawful right and claim to its property within the district be enforced, its title thereto quieted as against the claims of the defendants, and the cloud upon such title created by the consolidation and proceedings in pursuance thereof, removed; that the Consolidated Company be ousted from its possession and claim of title thereto and required to restore the same to the Lake Shore Company; that the mortgages executed by the Consolidated Company be decreed to be void as to such property; and for process and general relief.

This supplemental bill related solely to the matter of the consolidation and was framed upon the theory that the consolidation and subsequent proceedings in pursuance thereof, including the mortgages executed by the Consolidated Company, constituted a cloud upon the title to the property of the Lake Shore Company within the district, which the plaintiff, as a stockholder on its behalf and in its right, sought to have removed.

(1) There was, however, no allegation that any of the nine consolidating companies which it was sought to make defendants, claimed, either before or after the consolidation, any right, title or interest in the properties of the Lake Shore Company within the

157 district. On the contrary, it was specifically alleged that the officers of all the consolidating companies, including the New York Central Company, claimed that the title to the properties of the several constituent companies had been vested in the Consolidated Company. And this was admittedly the effect of the consolidation, if valid, under the provisions of the Ohio General Code. Clearly, therefore, the supplemental bill, which lacked either allegation that any of these companies asserted any claim or title to the property in question or prayer for relief against them, presented no ground whatever for making them parties or permitting the supplemental bill to be filed against them.

(2) As to the Consolidated Company and mortgage trustees, a more difficult question, however, arises. The defendants earnestly insist that the supplemental bill could not be properly filed because it sought to change the nature of the action from one in personam to one to remove cloud from title to property. Equity Rule 34 provides, however, that upon application of either party, the court may, upon just terms, permit him to file "a supplemental pleading, alleging material facts occurring after his former pleading." And if the plaintiff's original bill is sufficient to entitle him to one kind of relief, and facts subsequently occur to entitle him to other and more extensive relief, he may have such relief by setting out the new matter in the form of a supplemental bill. *Candler vs. Pettit*, 1 *Paige Ch.* (N. Y.) 168; *Sheffield Iron Co. vs. Newman* (5th Cir.), 77 Fed. 770, 791. Here the original petition had sought to prevent the Lake Shore Company from entering into the consolidation at a time when only an action in personam would lie, and had prayed that if pending the action such consolidation were effected, it should be set aside. And the consolidation having been thereafter effected, pending the action, we hence do not regard it as an insuperable objection to the filing of a supplemental bill seeking to set it aside, that the nature of the action would, in effect, be thereby changed.

(3) It is also urged as an objection to the supplemental bill that it appeared from its allegations that neither the plaintiff nor the Lake Shore Company was in possession of the property from which it was sought to remove the cloud, but that the same was in possession of the Consolidated Company. However, the general equity rule that a bill to remove cloud from title can only be filed by one 158 in possession, is based upon the ground that the plaintiff ordinarily has an adequate remedy at law by suit in ejectment, and does not prevent the maintenance of such bill by one not in possession where there are other grounds of equitable relief. *United States vs. Wilson*, 118 U. S. 86, 89; *American Association vs. Williams* (6th Cir.), 166 Fed. 17, 21; *Butterfield vs. Miller* (6th Cir.), 195 Fed. 200, 202. And since in the situation disclosed by the supplemental bill, the plaintiff could only proceed in equity, by asserting derivatively, as a stockholder, the right in the Lake Shore Company to have the cloud from its title removed, this being a recognized ground of equitable jurisdiction, we conclude that the mere lack of

possession in either the plaintiff or the Lake Shore Company was not of itself fatal to the plaintiff's right to maintain the supplemental bill. This conclusion is strengthened by the holding in *Citizens Savings Bank vs. Illinois Central Railroad*, 205 U. S. sup., that a suit brought by owners of stock of a railroad company for the cancellation of deeds and leases under which its properties were held and managed by another corporation and in its possession, was a suit of which the Federal Court had jurisdiction under sec. 8 of the Act of March 3, 1875 (now sec. 57 of the Judicial Code), as one to remove an incumbrance or cloud upon property within the district; although it is to be noted that this case was determined purely upon the question of jurisdiction, and that the court stated (at pp. 58 and 59) that in the absence of a demurrer or motion to dismiss for want of equity, it expressed no opinion upon the question whether, upon the showing made by the bill, the plaintiff was entitled to a decree giving it the relief asked.

(4) Passing, without determination, the question whether the supplemental bill substantially complied with the requirements of Equity Rule 27, as a stockholders' bill asserting derivatively a vested right in the Lake Shore Company, we reached the underlying question whether in any event the action of the District Court in refusing leave to file it, is, in view of the entire record, reviewable by this Court.

The granting or refusing of leave to file a supplemental bill rests in the discretion of the trial court; and is not reviewable by an appellate court unless there has been a gross abuse of such discretion. *Berliner Gramaphone Co. vs. Seaman* (4th Cir.), 113 Fed. 750, 754, and cases therein cited. And see *Gooch vs. Presbyterian Hospital* (6th Cir.), 239 Fed. 828, 830.

159 And, obviously, many matters which would not have constituted such want of equity as to prevent the maintenance of an original bill whose filing was a matter of right, are nevertheless circumstances to be properly considered in determining whether, as a matter of sound judicial discretion, leave should have been granted to file a supplemental bill as a matter of grace. See *Continental Securities Co. vs. Interborough Co.* (D. C.), 207 Fed. sup., at p. 472.

The record disclosed the following facts: The plaintiff owned only 5 shares of the stock of the Lake Shore Company, out of a total outstanding issue of 499,961 shares. It had acquired this stock June 27, 1914, that is, more than two months after April 29, 1914, the date of the consolidation agreement; and, it is fairly inferable, after such agreement had been entered into by the directors of the several companies. At the meeting of the stockholders of the Lake Shore Company only 77 other shares of stock had joined with it in voting against the consolidation. None of these other stockholders had joined either in the original petition or in the application for leave to file the supplemental bill. The line of the Lake Shore Company's railroad extended from Buffalo, New York, through Pennsylvania, Ohio and Indiana, to Chicago, Illinois, with branches to various

points in Ohio, Indiana and Michigan. The supplemental bill, however, related merely to that portion of its property which was within the Northern District of Ohio. If maintained, the setting aside of the consolidation and mortgages to this limited extent only, leaving such Ohio property as a disconnected and separate segment, would clearly result in almost inextricable confusion, disturbance of business conditions and innumerable complexities. Furthermore, under the Ohio statute already cited, the plaintiff upon seasonable requirement, might have obtained the highest value of its Lake Shore stock during the two years preceding the consolidation agreement; while under the very terms of the consolidation it was entitled to receive for these 5 shares of stock 25 shares of the stock of the Consolidated Company. Under all the circumstances we think the trial judge was entirely justified in his conclusion that the plaintiff's interest not only approximated (relatively at least) the irreducible minimum, but was in danger of no ponderable damage if its efforts to set aside the consolidation should fail. And upon consideration 160 of all these facts, we are unable to conclude that the action of the trial court in denying the plaintiff leave to file the supplemental bill constituted such abuse of discretion as to now authorize us to review its action in this behalf.

We are more content to reach this conclusion since, if the consolidation is in truth an unlawful restraining of trade in violation of the Acts of Congress and constitutions and laws of the several states involved, and a prejudice to the public interest, it may well be assumed that such interest will be properly protected by due proceedings instituted by the Federal and State authorities, in which all parties may be brought before the court, a full investigation had, and the public wrongs, if any, corrected by efficient and appropriate remedies; while, furthermore, the denial of leave to the plaintiff to file a supplemental bill will not operate, as matter of law, to prevent it from seeking, by an appropriate and independent original bill, such relief in equity, if any, as it may be entitled to receive, in addition to such relief, if any, as it may hereafter properly obtain under its original petition or any other appropriate pleading supplemental thereto, which it may be granted leave to file.

6. Motions for Substituted Process.—The plaintiff moved for substituted process, under sec. 57 of the Judicial Code, for the New York Central Company, the individual defendants, Read, Evans and Wood, the nine other railroad companies which had entered into the consolidation, and the trustees under the mortgages and indenture executed by the Consolidated Company. This section provides that in any suit commenced in a District Court to remove any incumbrance, lien or cloud upon the title to property within the district, an order directing any non resident absent defendant to make defense may be served upon him wherever found, and that in default of his appearance, the court may entertain jurisdiction and proceed to an adjudication of the suit, which shall, as regards such absent defendant, affect only the property which is the subject of the suit and within the jurisdiction of the court. It relates, upon its face, only to suits

affecting property which is the subject matter of the suit; and, it is clear, only authorizes the service of such appearance order upon a defendant asserting a claim thereto. There was hence no ground whatever for granting such appearance order (termed by the plaintiff "substituted process") for the New York Central
161 & 162 Company under the original petition; which was purely an action in personam that did not relate to any property within the district to which the New York Central Company was asserting any claim. For like reason there was no ground for the issuance of such appearance order for the defendants Read, Evans and Wood. And since leave was denied to file the supplemental bill there was necessarily no ground for issuing appearance orders for any of the defendants thereunder.

7. For the reasons stated, the decree of the District Court is affirmed, except in so far as it dismissed those portions of the original petition wherein it was sought to enjoin the Lake Shore Company from entering into the proposed agreement and consolidation and to have receivers appointed of the stock owned by it in its various subsidiary companies and decrees made for their disposition and management, and in so far as it awarded against the plaintiff the general costs of the cause, as to which matters the decree will be reversed (the first of these matters being now material, even after the consolidation, at least in so far as relates to the final adjudication of costs); but such reversal is with leave to the Lake Shore Company to hereafter move in the District Court to dismiss so much of the original petition as sought to enjoin the Lake Shore Company from entering into the proposed agreement and consolidation on account of the alleged violation of the Federal Anti-trust Act; and except, further that in so far as the decree dismissed the remaining portions of the original petition, it is modified so that the dismissal, being for want of indispensable parties, is without prejudice. The plaintiff will pay two-thirds of the costs of the appeal; and the Lake Shore Company, one-third. And the cause will be remanded to the District Court for further proceedings not inconsistent with this opinion.

163 *Order of U. S. Circuit Court of Appeals Denying Petition for Rehearing.*

(Entered by the Court of Appeals April 12, 1918.)

Ordered, that appellant's petition for rehearing be and is hereby denied. No modification of the opinion or judgment herein is necessary since neither the opinion nor the leave granted the Lake Shore Company to hereafter move to dismiss so much of the original petition as relates to the alleged violation of the Federal Anti-trust Act, related or referred in any manner to so much of the petition as independently alleged that the proposed consolidation of railroads would be in violation of the Clayton Act. There is no ground to anticipate that the District Court may regard the opinion or judg-

ment herein as either stating or intimating that so much of the original petition should be dismissed as seeks to enjoin a violation of the Clayton Act. It is hence unnecessary to determine whether or not the original petition is, on its face, maintainable under the Clayton Act, or to express any opinion in regard thereto, or to modify in any respect the opinion and judgment herein.

Order on Mandate.

(Entered April 29, 1918, by Judge Westenhaver.)

This cause having been removed from this Court to the United States Circuit Court of Appeals for the Sixth Circuit by the appeal of the plaintiff from the decree entered in this cause in this Court on the 6th day of April, 1918, and the said Circuit Court of Appeals having ordered, adjudged and decreed that the decree of this Court in this cause be and the same is hereby affirmed in part and reversed in part in accordance with the opinion filed herein and said cause is remanded to the District Court for further proceedings not inconsistent with said opinion and it is further ordered that plaintiff pay two-thirds of the costs of the appeal.

Motion for Further and Particular Statement in Petition.

(Filed May 23, 1918.)

Now comes The Lake Shore & Michigan Southern Railway Company, and shows to the Court that in the opinion of the United States Circuit Court of Appeals, which accompanies the mandate to this Court in this case, it is found and stated:

"As the petition did not disclose the dates upon which the consolidation agreed had been signed by the boards of directors of the various companies, it did not appear therefrom that the plaintiff had bought its stock in the Lake Shore Company after such agreement had been signed by its directors and in contemplation of the consolidation."

And that in the same opinion, in treating of the question of the application in this Court by the plaintiff to file a supplemental petition, the Court finds and states:

"The record disclosed the following facts: The plaintiff owned only five (5) shares of the stock of The Lake Shore Company, out of a total outstanding issue of Four hundred and ninety-nine thousand, nine hundred and sixty-one (499,961) shares. It had acquired this stock June 27, 1914, that is more than two (2) months after

165 April 29, 1914, the date of the consolidation agreement, and it is fairly inferable after such agreement had been entered into by the directors of the several companies."

Defendant says that in the proposed supplemental petition, which plaintiff asked leave to file, and which petition was sworn to by an officer of plaintiff, the date of the resolution by this defendant's directors adopting the consolidation agreement is alleged to be April 29, 1914; but said allegation does not appear in the original petition filed by the plaintiff herein.

Defendant therefore moves the Court to require the plaintiff to make its petition herein definite by inserting therein the date of the agreements of consolidation, adopted by the directors of the defendant, and the other corporations entering into said consolidation agreement, or in default thereof that said petition be dismissed. Defendant refers to the opinion of the Circuit Court of Appeals and the mandate herein filed, for the purpose of showing to the Court that defendant ought not to be required to answer said petition until the same is made to contain allegations of fact known to complainant, and which involve the right of said complainant to any relief herein.

WALTER C. NOYES,
CHAS. T. LEWIS,
S. H. WEST,
Attorneys for Defendants.

Order on Motion to Petition—Motion Granted—Exceptions.

(Entered Nov. 20, 1918, by Judge Killits.)

This cause came on further to be heard upon the motion of defendant, The Lake Shore & Michigan Southern Railway Company for further and particular statement in petition, on consideration whereof the same is allowed, and the plaintiff is hereby required to make its petition herein definite by inserting therein the date of the agreements of consolidation adopted by the directors of the defendant and the other corporations entering into said consolidation agreement, and to file such amendment instanter, to which order and judgment of the court the plaintiff excepts.

Amendment to Petition.

(Filed Nov. 23, 1918.)

In obedience to the order of the court entered upon, and in allowance of, the motion of the defendants "to require the plaintiff to make its petition herein definite by inserting therein the date of the agreements of consolidation, adopted by the directors of the defendant, and the other corporations entering into said consolidation agreement," plaintiff alleges that April 29, 1914, was the date of the adoption of the agreement for the consolidation of the corporations hereinafter named, by the directors of such corporations respectively, namely: The New York Central and Hudson River Railroad Company, The Lake Shore and Michigan Southern Railway Company,

Geneva, Corning and Southern Railroad Company, The Terminal Railway of Buffalo, The Dunkirk, Allegheny Valley and Pittsburgh Railroad Company, Chicago, Indiana and Southern Railroad Company, Detroit and Chicago Railroad Company, Detroit, Monroe and Toledo Railroad Company, Kalamazoo and White Pigeon Railroad Company, The Northern Central Michigan Railroad Company, and The Swan Creek Railway Company of Toledo.

FREDERICK A. HENRY,
Of SNYDER, HENRY, THOMSEN, FORD &
SEAGRAVE,
Cleveland, Ohio,
Attorneys for Plaintiff.

STATE OF OHIO,
Cuyahoga County, ss.

Frederick A. Henry, being first duly sworn, says that he is one of the attorneys for the General Investment Company, plaintiff in the above entitled action; that he has read the foregoing amendment to petition; and that the allegations therein contained are true.

FREDERICK A. HENRY.

Sworn to before me and subscribed in my presence this 21st day of November, 1918.

[SEAL.]

ROBERT E. ROEHM,
Notary Public.

(Filed Dec. 6, 1918.)

Now comes the defendant, The Lake Shore and Michigan Southern Railway Company, and moves the Court to dismiss certain parts of the petition and the entire amended petition, as follows:

(1) Said defendant moves to dismiss so much of said petition as seeks to enjoin said defendant from entering into the proposed agreement and consolidation on account of the alleged violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies"—called in the petition the "Sherman Anti-trust Act"—(and the parts of the petition relating to such matter) because the plaintiff has no standing to maintain a suit to enjoin a violation of said Act and is not entitled to any of the relief prayed for based upon the alleged violations of said Act.

(2) Said defendant moves to dismiss so much of said petition as seeks to enjoin said defendant from entering into the proposed agreement and consolidation on account of the alleged violation of the Act of Congress approved October 15, 1914, called in the petition the "Clayton Act" (and the parts of the petition relating to such matter) because the plaintiff has no standing to maintain a suit to enjoin a

violation of said Act and is not entitled to any of the relief prayed for based upon the alleged violations of said Act.

(3) Said defendant moves to dismiss so much of said petition as seeks to enjoin said defendant from entering into the proposed agreement and consolidation on account of the violation of state constitutional and statutory provisions because the petition fails to aver facts sufficient to show any such violation.

(4) Said defendant moves to dismiss so much of said petition as seeks the appointment of receivers for its alleged holdings in the stocks of its subsidiary companies, and a decree for the disposition or management thereof, because.

(a) The petition fails to aver facts sufficient to entitle the plaintiff to such relief.

(b) Plaintiff has no right or standing to prosecute this suit therefor.

(5) Said defendant moves to dismiss so much of said petition as seeks to enjoin said defendant from entering into said 168 proposed agreement and consolidation on account of the violation of state constitutional and statutory provisions (not including, however, the charge of violating G. C. 614-59 of Ohio by increasing the capital stock of the consolidated company beyond the aggregate of the stocks of the consolidating companies) because

(a) The petition does not aver facts sufficient to show such violation.

(b) Plaintiff has no right or standing to maintain this suit on such grounds.

(6) Said defendant moves to dismiss the entire petition as amended for want of equity in that it now appears that the plaintiff bought its stock in said defendant corporation after the consolidation agreement had been signed by the directors and in contemplation of the consolidation.

(7) Said defendant also moves to dismiss the entire petition as amended because upon the facts therein stated the plaintiff is not entitled to the relief prayed for nor any part thereof.

(8) Said defendant also moves to dismiss the entire petition as it now stands because said petition as amended with the matters eliminated in accordance with the decree of the United States Circuit Court of Appeals fails to state a valid cause of action in equity.

WALTER C. NOYES,
S. H. WEST,
Solicitors for the Lake Shore and
Michigan Southern Railway Company.

189 *Motion to Strike Out Portions of Defendant's Motion to Dismiss.*

(Filed Feb. 24, 1919.)

Comes now the plaintiff, General Investment Company, and moves the court to strike from the motion of The Lake Shore and Michigan Southern Railway Company "to dismiss certain parts of the petition and the entire amended petition" of the plaintiff, the following paragraphs, for the reason that they are not within the scope of the leave granted by the United States Circuit Court of Appeals herein "to the Lake Shore Company to hereafter move in the District Court to dismiss so much of the original petition as sought to enjoin the Lake Shore Company from entering into the proposed agreement on account of the alleged violation of the federal anti-trust act," as construed in the subsequent order of said Circuit Court of Appeals denying appellant's petition for rehearing and adjudging that "neither the opinion nor the leave granted the Lake Shore Company to hereafter move to dismiss so much of the original petition as relates to the alleged violation of the federal anti-trust act related or referred in any manner to so much of the petition as independently alleged that the proposed consolidation of railroads would be in violation of the Clayton Act." This motion is made as to each paragraph separately and not as a series, to wit:

1. Said plaintiff moves to strike from said motion the entire paragraph (2) thereof, which mentions the Clayton Act.
2. Said plaintiff moves to strike from said motion the entire paragraph (3) thereof, which mentions state constitutional and statutory provisions.
3. Said plaintiff moves to strike from said motion the entire paragraph (4) thereof, which mentions the subject of receivers.
4. Said plaintiff moves to strike from said motion the entire paragraph (5) thereof, which mentions state constitutional and statutory provisions, not including, however, the charge of violating General Code 614-59 of Ohio, etc.

FREDERICK A. HENRY,
OF SNYDER, HENRY, THOMSEN, FORD &
SEAGRAVE,
Solicitor for the Plaintiff.

914 Williamson Bldg., Cleveland, Ohio.

170 *Order Overruling Plaintiff's Motion to Strike Out—Exceptions; Defendant's Motion to Dismiss Granted—Exceptions.*

(Entered Jan. 20, 1920, by Judge Killits.)

This cause coming on to be heard upon the motion of the plaintiff to strike certain grounds and parts from the motion of the defendant, The Lake Shore & Michigan Southern Railway Company the same is heard and considered and overruled, to which action of the court the plaintiff is allowed and hereby given an exception.

This cause coming on further to be heard upon the motion of the defendant, The Lake Shore & Michigan Southern Railway Company to dismiss and strike out severally the allegations of the amended petition herein in paragraphs one (1), two (2), three (3), four (4), five (5), six (6) described, the same is heard, and said motion is allowed as to each of said grounds and as to each of the allegations, respectively, to which action of the court the plaintiff is allowed and is hereby granted an exception.

And this motion coming on further to be heard severally upon numbered paragraphs seven (7) and eight (8) of the motion of the defendant, The Lake Shore & Michigan Southern Railway Company, to dismiss the amended petition herein, the same is heard as to each of said numbered paragraphs of said motion, and the court considering the same, does allow, separately, said motion on the ground stated in said numbered paragraphs thereof seven (7) and eight (8) respectively, to which action of the court the plaintiff is allowed and is hereby given an exception.

It is therefore ordered that the said amended petition be and the same is hereby dismissed, to which action of the court the plaintiff is allowed and is hereby given an exception.

171 *Petition for Appeal.*

(Filed March 31, 1920.)

The above named plaintiff conceiving itself aggrieved by the final decree made and entered on the 20th day of January, 1920, and the interlocutory orders theretofore made in the above entitled cause does hereby appeal from said orders and decree to the United States Circuit Court of Appeals for the Sixth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said orders and decree were made, duly authenticated, may be sent to the United States Court of Appeals for the Sixth Circuit.

FREDERICK A. HENRY,
Of SNYDER, HENRY, THOMSEN, FORD &
SEAGRAVE,
914 Williamson Bldg., Cleveland, Ohio,
Solicitor for Plaintiff.

The foregoing claim of appeal is allowed. Bond, \$500.

JOHN M. KILLITS,

District Judge.

Dated March 31, 1920.

Assignment of Errors.

(Filed March 31, 1920.)

And now, upon the 31st day of March, A. D. 1920, comes the said complainant, by its solicitor, Frederick A. Henry, of Snyder, Henry, Thomsen, Ford & Seagrave, 914 Williamson Building, Cleveland, Ohio, and says that the interlocutory orders and final decree in the above entitled cause are erroneous and against the just rights of said complainant for the following reasons:

First. The court erred in sustaining the motion of the defendants "to require the plaintiff to make its petition herein definite by inserting therein the date of the agreements of consolidation, adopted by the directors of the defendant, and the other corporations entering into said consolidation agreement."

172 Second. The court erred in not sustaining the paragraph numbered "1" of the General Investment Company's "motion to strike out portions of defendants' motion to dismiss," and in not striking from said motion to dismiss the entire paragraph (2) thereof, which mentions the "Clayton Act."

Third. The court erred in not sustaining the paragraph numbered "2" of the General Investment Company's said motion, and in not striking from defendants' said motion to dismiss the entire paragraph (3) thereof, which mentions state constitutional and statutory provisions.

Fourth. The court erred in not sustaining the paragraph numbered "4" of the General Investment Company's said motion, and in not striking from defendants' said motion to dismiss, the entire paragraph (5) thereof, which mentions "state constitutional and statutory provisions, not including, however, the charge of violating General Code 614-59 of Ohio," etc.

Sixth. The court erred in sustaining the motion of defendant The Lake Shore & Michigan Southern Railway Company "to dismiss certain parts of the petition," etc., as to the paragraph numbered (1) thereof, and in dismissing and striking out "so much of said petition as seeks to enjoin said defendant from entering into the proposed agreement and consolidation on account of the alleged violation of the Act of Congress approved July 2, 1890, entitled 'An Act to Protect Trade and Commerce against Unlawful Restraints and monopolies'—called in the petition the 'Sherman Anti-trust Act'—(and the parts of the petition relating to such matter)."

Seventh. The court erred in sustaining the motion of defendant The Lake Shore & Michigan Southern Railway Company "to dis-

miss certain parts of the petition," etc., as to paragraph numbered (2) thereof, and in dismissing and striking out "so much of said petition as seeks to enjoin said defendant from entering into the proposed agreement and consolidation on account of the alleged violation of the Act of Congress approved October 15, 1914, called in the petition the 'Clayton Act' (and the parts of the petition relating to such matter)."

Eighth. The court erred in sustaining the motion of defendant The Lake Shore & Michigan Southern Railway Company "to dismiss certain parts of the petition," etc., as to paragraph numbered (3) thereof, and in dismissing and striking out "so much of

173 said petition as seeks to enjoin said defendant from entering into the proposed agreement and consolidation on account of the violation of state constitutional and statutory provisions."

Ninth. The court erred in sustaining the motion of defendant The Lake Shore & Michigan Southern Railway Company "to dismiss certain parts of the petition," etc., as to paragraph numbered (4) thereof, and in dismissing and striking out "so much of said petition as seeks the appointment of receivers for its alleged holdings in the stocks of its subsidiary companies, and a decree for the disposition or management thereof."

Tenth. The court erred in sustaining the motion of defendant The Lake Shore & Michigan Southern Railway Company "to dismiss certain parts of the petition," etc., as to paragraph numbered (5) thereof, and in dismissing and striking out "so much of said petition as seeks to enjoin said defendant from entering into said proposed agreement and consolidation on account of the violation of state constitutional and statutory provisions (not including, however, the charge of violating G. C. 614-59 of Ohio by increasing the capital stock of the consolidated company beyond the aggregate of the stocks of the consolidating companies)."

Eleventh. The court erred in sustaining the motion of defendant The Lake Shore & Michigan Southern Railway Company as to paragraph numbered (6) thereof, "to dismiss the entire petition as amended for want of equity in that it now appears that the plaintiff bought its stock in said defendant corporation after the consolidation agreement had been signed by the directors and in contemplation of the consolidation."

Twelfth. The court erred in sustaining the motion of defendant The Lake Shore & Michigan Southern Railway Company as to paragraph numbered (7) thereof, "to dismiss the entire petition as amended because upon the facts therein stated the plaintiff is not entitled to the relief prayed for nor any part thereof."

Thirteenth. The court erred in sustaining the motion of the defendant, The Lake Shore & Michigan Southern Railway Company, as to paragraph numbered (8) thereof, "to dismiss the entire petition as it now stands because said petition as amended with the mat-

ters eliminated in accordance with the decree of the United States Circuit Court of Appeals fails to state a valid cause of action in equity."

174 Fourteenth. The court erred in entertaining the defendant, The Lake Shore & Michigan Southern Railway Company's motion to dismiss, to the extent that the motion so filed transcended and transgressed the "leave to the Lake Shore Company to hereafter move in the District Court to dismiss so much of the original petition as sought to enjoin the Lake Shore Company from entering into the proposed agreement and consolidation on account of the alleged violation of the Federal Anti-trust Act," as such leave was granted and restricted by the Circuit Court of Appeals in its opinion and mandate, and, also, as the same was further defined, in said court's memorandum opinion denying the application for a rehearing, to mean that nothing in the leave granted "related or referred in any manner to so much of the petition as independently alleged that the proposed consolidation of railroads would be in violation of the Clayton Act."

Fifteenth. The court erred in failing and refusing to follow and be governed by the law of the case as contained in the opinion, decree and mandate, and in the memorandum opinion and order denying the application for a rehearing of the Circuit Court of Appeals, heretofore filed herein; and in making and entering the decree of dismissal contrary to the rulings and instructions of said opinion, decree and mandate, and of the memorandum opinion and order denying the application for a rehearing.

Sixteenth. The court erred in dismissing said amended petition.

Seventeenth. The court erred in rendering final judgment and decree against the complainant.

Wherefore, the said complainant, General Investment Company, prays that the said orders and decree of the District Court of the United States for the Northern District of Ohio, Eastern Division, be reversed and that such directions be given and decree made in respect to the matters herein referred to in favor of this complainant as prayed for in its motion and pleadings hereinbefore mentioned, with costs to be taxed.

GENERAL INVESTMENT COMPANY,
By FREDERICK A. HENRY,
Of SNYDER, HENRY, THOMSEN, FORD &
SEAGRAVE,
914 Williamson Bldg., Cleveland, Ohio,
Its Attorneys.

175

Order Allowing Appeal.

(Entered March 31, 1920, by Judge Killits.)

On petition of Frederick A. Henry of Snyder, Henry, Thomsen, Ford & Seagrave, solicitors and of counsel for plaintiff, General Investment Company;

It is ordered that an appeal to the United — Circuit Court of Appeals for the Sixth Circuit from the decree heretofore filed and entered herein on the 20th day of January, 1920, be and the same is hereby allowed and that a certified transcript of the record in accordance with the rules and practice for the Courts of Equity of the United States as promulgated by the Supreme Court of the United States forthwith be transmitted to said United States Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed in the sum of \$500.

Bond on Appeal.

(Filed April 1, 1920.)

Know all men by these presents, that we, General Investment Company as principal, and American Surety Company as surety, are held and firmly bound unto The Lake & Michigan Southern Railway Company, in the full and just of Five hundred and no/100 Dollars, to be paid to the said The Lake Shore & Michigan Southern Railway Company, its certain attorneys, executors, administrators and assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 1st day of April in the year of our Lord One Thousand Nine Hundred and Twenty.

176 Whereas lately at a session of the District Court of the United States for the Eastern Division of the Northern District of Ohio in a suit pending in said court between said General Investment Company and said The Lake Shore & Michigan Southern Railway Company, numbered 287, in Equity, a decree was rendered against the said General Investment Company, and the said General Investment Company having obtained allowance of its petition for appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to The Lake Shore & Michigan Southern Railway Company citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati in said Circuit on the — day of — next.

Now the condition of the above obligation is such that if the said General Investment Company shall prosecute said appeal to effect, an-

answer of damages and costs for its failure to make its plea good, then the above obligation to be void else to remain in full force and virtue.

GENERAL INVESTMENT COMPANY,
By Its Solicitor, **FREDERICK A. HENRY.**
[SEAL.] **AMERICAN SURETY COMPANY OF
NEW YORK.**
EDWARD F. ARCHER,
Resident Vice President.

Attest:

[SEAL.] **N. A. ZEECK,**
Resident Assistant Secretary.

Sealed and delivered in the presence of:

A. F. BERRY.
A. G. GORMAN.

Approved:

D. C. WESTENHAVER,
United States District Judge.

177 & 178

Citation.

United States Circuit of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To the Lake Shore & Michigan Southern Railway Company, Central Trust Company of New York, New York Central & Hudson River Railroad Company, William A. Read, Henry Evans and Willis D. Wood, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit on the *1st day of May next, pursuant to a petition for appeal filed in the clerk's office of the District Court of the United States for the Northern District of Ohio, wherein General Investment Company is appellant and you are appellees to show cause, if any there be, why the decree rendered against the said appellants as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 1st day of April in the year of our Lord one thousand nine hundred and twenty and of the Independence of the United States of America the one hundred and forty-fourth.

[SEAL.]

D. C. WESTENHAVER,
Judge of the District Court.

*Not exceeding 30 days from day of signing.

Service of the above citation is hereby acknowledged and appearance of appellee, L. S. & M. S. Ry. Co., is hereby entered.

THE LAKE SHORE & MICHIGAN SOUTHERN
RY. CO.

By S. H. WEST,

Its Attorney.

April 19, 1920.

179 PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Decree.

(Filed Dec. 7, 1920.)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby affirmed with costs.

Opinion.

(Filed Dec. 8, 1920.)

180 Filed Dec. 8, 1920. Arthur B. Mussman, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 3425.

GENERAL INVESTMENT COMPANY, Appellant,

v.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY et al.,
Appellees.

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

Submitted October 14, 1920.

Decided December 7, 1920.

Before Knappen, Denison, and Donahue, Circuit Judges.

DENISON, *Circuit Judge*:

The General Investment Co. filed a bill to enjoin the consolidation of the Lake Shore and the New York Central Railroads. The

District Court dismissed the bill because jurisdiction was not acquired over the New York Central, and that was thought essential to the object of the suit. On appeal to this court, we affirmed the conclusion as to the lack of jurisdiction over the New York Central, but we thought that some of the relief prayed might, in a proper case, be granted against the Lake Shore alone, and that, to that extent, the New York Central was not an indispensable party; accordingly, we reversed the dismissal and sent the case back for further proceedings in accordance with the opinion. This is reported in 250 Fed. 160, and, to that opinion, we refer for a fuller statement of the essential facts. After the remand, the bill of complaint was amended so as to show that plaintiff's purchase of its five shares of

stock in the Lake Shore was not, in fact, made until after 181 the directors' consolidation agreement had been executed.

Thereupon, the defendant filed a further motion in which it asked: 1. That the bill of complaint be dismissed insofar as it was founded upon the Sherman Act, and this for the reason that a private individual could not maintain such a bill; 2. That it be dismissed insofar as it was founded on the Clayton Act, and this for the reason that the state court, in which the suit was commenced, had no jurisdiction of a case founded on the Clayton Act; 3. That insofar as it was founded on the constitutions or statutes of the several states, it be dismissed because it did not state a good cause of action. The motion to dismiss was granted, and plaintiff appeals.

1. The Anti-Trust Act (Act of July 2, 1890).—The decision in Paine Lumber Co. v. Neal, 244 U. S. 459, is clearly decisive and justifies the dismissal of this branch of the bill, unless the case may be distinguished from that, because this suit is by a stockholder and that was by a stranger. It is not correct to say that the court there decided only that such a suit could not be maintained under Section 4 of the act, though that happened to be the language used; that case was not brought under Section 4, and the plaintiff made no claim of any right given by that section; the decision was that that suit could not be maintained; and the reference to "under Section 4" must have been intended to express the thought that under the effect of Section 4 upon the whole act, the suit would not lie. It is now said that the effect of the Anti-Trust Act is to make a prohibited consolidation ultra vires of the corporation; that equity always had jurisdiction of a suit by a stockholder to enjoin his corporation from an ultra vires act; and, hence, that in such a suit as this, the court of equity does not depend for its jurisdiction on the Anti-Trust Act, and the case is not one "under the act." We are unable to see any distinction in principle, in this respect, between a stockholder's case and the Paine case. A stranger who was about to suffer irreparable loss from unlawful acts of another had the right to proceed in equity for an injunction against that stranger just as much as a stockholder did against his corporation. The jurisdiction of equity does not depend on the Anti-Trust Act in the suit by the stranger any more than it does in the suit by the stockholder; in each case alike, the only important effect of that statute is to make unlawful the act sought to be enjoined. The present case is brought "under the anti-

trust laws" no more and no less than was the Paine case. It is to be noticed that in the dissenting opinion in that case, the stockholders' cases, which had permitted the enforcement of rights dependent on the act, were approved; but the majority does not suggest 82 that they are distinguishable; and we think that the effect of the majority opinion is to overrule them. The theory of the decision we think must be that the Anti-Trust Act declared certain rights and duties, that it intended there should arise therefrom only two remedies,—a public one and a private one, each as specified, and that no other private remedy should depend thereon (Wilder Co. v. Corn Co., 236 U. S. 165, 174). It seems clear enough that the point as to which Mr. Justice Holmes said he was in the minority was as to the effect of the Clayton Act upon the right to an injunction against a labor boycott (Duplex Co. v. Deering, C. C. A. 2, 252 Fed. 722, 743, 747). Holding this view of the Paine decision, it follows that the court below was right in dismissing so much of this bill as was based on the Sherman Anti-Trust Act.

2. The Clayton Act (Act of October 15, 1914).—Section 16 of this act (88350, U. S. C. S.) provides that "any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by violation of the anti-trust laws." The effect of this section undoubtedly is to permit maintenance under the Sherman Anti-Trust Act of that class of suits the right to maintain which had been denied in the Paine case; but since the present case was commenced in a state court and was by defendant removed to the court below, we must enquire whether this section authorized the state courts to act, and, if not, then whether the removal to the federal court makes any difference.

The grant of jurisdiction is to the "courts of the United States." This language has been expressly held not to reach even territorial courts, although they were created by the laws of the United States (McCallister v. U. S., 141 U. S. 174, 179). Much less can it reach those courts which are wholly of another jurisdiction. It is true, there are cases where this term has been thought to reach some of the courts of the District of Columbia (see Page v. Burnstine, 102 U. S. 664; United States v. Mills, Dist. Col., 11 App. Cas. 500, 504), but that was because the language and purpose of the act in question were especially appropriate to be so extended. In the present case, the statute was dealing solely with a subject-matter of exclusively federal jurisdiction,—interstate commerce,—and while Congress might have entrusted some of its exercise to the state courts, there is no reason to presume such an intention; the natural presumption is rather the contrary. Not only had the ordinary meaning of the phrase

3 "courts of the United States" become fixed by familiar judicial construction long before the Clayton Act was passed, but it had been customarily used by Congress with the same finite meaning; for example, Section 256 of the Judicial Code refers to the "courts of the United States" and the "courts of the several states" as different classes, exclusive of each other. Further, this section pertains only to the remedy, and there would be a strong

presumption that a federal remedial statute did not relate to the remedies of another jurisdiction. From these considerations, we have no doubt that a suit brought in a state court can get no help from Section 16.

When the case was commenced, the state court either had or had not power to give relief because of the federal anti-trust laws. If it had not, we do not comprehend how jurisdiction of the subject-matter could have been conferred by the removal to the federal court. The jurisdictional objection was not as to the person, but as to the subject-matter. In *De Lima v. Bidwell*, 182 U. S. 1, 174, it was said that defendant neither gains nor loses by the removal, that the case proceeds as if no such removal had taken place, and that the defendant unquestionably has the right, in the federal court, to show that the state court had no jurisdiction. While these statements were made with reference to a different situation from that here existing, we see no reason to doubt their present applicability. It follows that the court below, like the state court, had no jurisdiction of the remedy given by Section 16 of the Clayton Act, and could not grant any relief upon that theory.*

3. State Constitutions and Laws.—So far as the relief prayed for was shown to stand upon the supposed violations of state constitutions or laws, no question of jurisdiction is involved, but we must ascertain whether the bill states a good case for the relief sought. We find ourselves able to reach a conclusion upon this subject without inquiry into the ultimate question, elaborately argued by plaintiff, whether the constitution and laws of (e. g.) Ohio prohibit such a consolidation of railroads as this was.

We first observe that, by the elimination of the New York Central and the failure to reach the Read Committee, a very large part of the allegations of the bill and of the prayers for relief have been left inoperative; and that, although the New York Central has been held not to be an indispensable party as to portions of the relief prayed, it is by no means clear just how much of the bill is left with 184 an effective status. Certainly many of the allegations lose their force when we remember that we can consider no controversy to which the New York Central is an indispensable party.

We next observe that the consolidation sought to be enjoined was only a new formulation of the situation which had been existing for many years. It is expressly averred that the obnoxious control of parallel and competing lines had been accomplished, and for many years maintained, by stock-ownership and control. It does not seem to be claimed that the proposed consolidation would create any restraints on competition that did not already exist. We find no definite statement that what was proposed would be obnoxious to any statute or constitutional provision which did not relate to competition between parallel lines, excepting the claim that the proposed consolidation would increase the capital stock and debts above

*The status of the present controversy in its relation to the Sherman and Clayton Acts, was considered by the Appellate Division, New York, and a suit like this one was dismissed (*Venner v. New York Cent.*, 177 App. Div. 296; affirmed, 226 N. Y. 583; certiorari refused, 249 U. S. 617).

the permitted limit. It is probable, also, from the silence of the bill, that during all these years the public authorities of the various states have rested content and have not indicated any belief that public policy was being violated, and it may likewise seemingly be inferred that no public authorities are now objecting to the proposed consolidation, but that, on the contrary, they are all content.

Further, we notice that plaintiff owns only one one-thousandth of one per cent of the capital stock, that no other shareholder has accepted its invitation to join in preventing the imminent irreparable injury, and that this interest plaintiff bought after the consolidation contract was made. He seems to be a volunteer, rather than a conscript.

We have, then, a case where a private suitor, with a minimum of ponderable interest and with no disposition to beware of entrance to a quarrel, is seeking relief upon the sole ground that the public policy of the state is being violated, and where the state authorities have long acquiesced and do acquiesce in any violation there may be. Under such circumstances, the court of equity will be strict in requiring the plaintiff to point out with precision and certainty in what respects the law is about to be violated, and to show, clearly and positively, substantial and irreparable injury to its private rights. A measure of imperfection in pleading that might well be overlooked in the ordinary controversy, should not be disregarded in such a case as this.

When we examine the allegations of the bill with respect to the proposed consolidation, and with respect to (e. g.) the Ohio situation,

we find it said to be "a violation of the public policies of 185 the * * * states of * * * Ohio * * * and

of the common law of those states * * * and a violation of the various laws of * * * said states aforesaid, providing against and making illegal consolidations of and control of parallel and competing lines, etc." While, of course, this court will take judicial notice of the constitution and laws of Ohio, yet such an allegation is thoroughly unsatisfactory as a tender of an issue, and confirms the impression otherwise strongly produced that the bill was intended to rest upon the federal anti-trust laws and that the references to the state laws were by way of makeweight. If, however, even this indefiniteness in pleading could be excused, we would come to a more vital defect: There is a statement, in words, of irreparable injury, but that is a conclusion. There is no direct allegation of any pecuniary loss. It is not charged that plaintiff's shares of stock will be worth any less, presently or prospectively, after the consolidation than they are now, nor that they will suffer any net pecuniary injury. True, it is said that the corporation will suffer certain losses and will incur certain penalties, but this is only one side of the account. The bill shows that the stockholders, like plaintiff, will be entitled to receive five shares of the new stock for each one of the old; practically all the stockholders are approving and must regard the consolidation as a benefit; under these conditions, a bill, which fails to allege that plaintiff's stock will be worth any less in dollars and

cents or in any other kind of value, now or hereafter, if the consolidation goes through, is fatally defective.

4. Our Former Decision.—Plaintiff insists that the questions we have discussed are not open on this appeal. It is said that if the bill of complaint was defective for the reasons stated, the action of the trial court was right when it first dismissed the bill, although it did so upon the erroneous ground that the New York Central was an indispensable party. It is further said that upon the first appeal it was the duty of this court to affirm the order of dismissal if it was right for any reason, and that, when we reversed the order of dismissal, we necessarily decided that the bill of complaint was immune to a motion to dismiss for any reason.

A reference to the former record shows that the motion to dismiss, made in the court below because of lack of jurisdiction over the New York Central, also included, as one of its grounds, the claim that the bill of complaint did not state a good cause; but the opinion of the court below at that time shows that such a question was never reached or considered. When that appeal came up for hearing in this court, it was open to the appellee, the Lake Shore

186 Company, to insist that the dismissal was right for the same reasons that are now insisted upon. The briefs then filed show that this was not done, and that no reference was made by counsel for either party to the questions we have now discussed. There is no reference to them in our opinion. So, it must be conceded that the questions now said to have become *res judicata* or the law of the case by our former action, were never presented to us or considered by us; and we can not think that questions with such a history are foreclosed to us.

It is undoubtedly true that when an appellate court affirms a decree below, it amounts to a decision, so far as the single case is concerned, that there was no valid objection to the decree, and reaches those unmentioned as well as those discussed (*Tyler v. Maguire*, 84 U. S. 253). The logic of that situation does not apply, where there is a reversal. In the former case, the matter is ended and there is nothing for further consideration. In the latter event, the case is sent back expressly for further action, and the extent to which further action is concluded depends, not on what might have been decided, but upon what was decided. It is common for an appellate court to say, when reversing, that it leaves certain questions undecided because they have not been considered; it has not been our understanding that upon a reversal we were deciding questions not presented or considered; and we think that is not the effect of such reversal (*Mutual Co. v. Hill*, 193 U. S. 551, 553; *Taenzer v. Chicago Co.*, C. C. A. 8, 191 Fed. 543, 547).

We interpret our former opinion, and the order denying rehearing, as expressly or by necessary implication leaving open to the court below the right to consider the power to maintain the action under either the Sherman or Clayton Act; and the decision on those points having been against plaintiff, we think it was not only within the power but it was the duty of the court below to consider whether a good case was made under the state laws.

5. The Amount Involved.—The suggestion presents itself whether there may be a duty to remand to the state court rather than dismiss the bill. Since we hold that plaintiff does not state a good case for relief arising under the laws of the United States, it might be said that jurisdiction to dispose of the merits then rests only on diverse citizenship, and that this was an insufficient basis in the face of our holding that the bill alleges no substantial damages. In a controversy like this, the damage to plaintiff is not necessarily the amount involved; but, if it were, this result does not follow. If the case had been originally commenced in the federal court, and
187 the jurisdiction of that court had been invoked only on the ground that the case arose under the laws of the United States, it is settled that the court would proceed to dispose of all the questions in the case, even after it had reached the conclusion that plaintiff had failed to make out a good case on the federal question (*Siler v. Louisville Co.*, 213 U. S. 175, 191). We do not see how the question is different when the case is begun in the state court and is removed. (See *Missouri v. Missouri Comrs.*, 183 U. S. 53, 59.) If we thought no federal question was then involved, so that the case had not been removable on that ground, we would have a different situation; but we have not reached any such conclusion as that. The case, as formulated in the bill, plainly was one arising under the laws of the United States. The removal, whether on that ground or not, brought into the federal court a case which then came to be rightly here, and jurisdiction of the case so obtained (and to the extent possessed by the state court), continues for all purposes.

The decree below should be affirmed; but, as we rest the affirmance in part upon an insufficiency of pleading,—as to the state constitutions and statutes and the damages,—the affirmance will be without prejudice to the filing in a proper court of a new bill based upon those constitutions and laws only.

188

Petition for Appeal.

(Filed Feb. 7, 1921.)

And now comes the General Investment Company, appellant herein, and prays that an order may be made allowing it an appeal from the final judgment of the United States Circuit Court of Appeals in and for the Sixth Circuit, entered December 8, 1920, and from all interlocutory orders and decrees in the case of General Investment Company, Appellant, against The Lake Shore & Michigan Southern Railway Company, Central Trust Company of New York, New York Central & Hudson River Railroad Company, William A. Read, Henry Evans and Willis D. Wood, Appellees, to the Supreme Court of the United States.

Assignment of errors is presented herewith.

GENERAL INVESTMENT COMPANY,
By FREDERICK A. HENRY,

Its Attorney,
OF SNYDER, HENRY, THOMSEN, FORD &
SEAGRAVE.

914 Williamson Bldg, Cleveland, O.

Assignment of Errors.

(Filed Feb. 7, 1921.)

And now comes the said appellant, General Investment Company, by its solicitor, Frederick A. Henry, and says that the interlocutory orders and final judgment of the United States Circuit Court of Appeals, in and for the Sixth Circuit, in said cause are erroneous and against the just rights of said appellant for the following reasons:

First. The United States Circuit Court of Appeals, in and for the Sixth Circuit, erred in not sustaining the motion of the General Investment Company to remand the cause to the Court of Common Pleas of Cuyahoga County, Ohio, from whence it came.

Second. The United States Circuit Court of Appeals, in and for the Sixth Circuit, erred in not holding that for want of proper venue this suit was unlawfully removed from the Court of Common Pleas of Cuyahoga County, Ohio, to the United States District Court for the Northern District of Ohio, Eastern Division, upon the joint petition of the defendants The Lake Shore and Michigan Southern Railway Company, a citizen and resident of Ohio, and an inhabitant of said District, and The New York Central and Hudson River Railroad Company which was not a citizen of Ohio (The New York Central Railroad Company, which was not a party, also joining therein) alleging that the suit was one of a civil nature in equity arising under the laws of the United States and of which the District Courts of the United States are given original jurisdiction under the act approved March 3, 1911, title "The Judiciary," and also that in said suit and as between said petitioning defendants and 190 the plaintiff, which is a citizen and resident of the State of Maine, there was a controversy wholly between citizens of different states and which could be fully determined as between them.

Third. The United States Circuit Court of Appeals, in and for the Sixth Circuit erred in holding that this being a suit in which an essential issue arises under the laws of the United States, the fact that complainant had chosen to join a resident corporation as party defendant, takes the case out of the class where, because both complainant and defendants are all non-residents of the district, jurisdiction in the federal court by removal from the state court depends upon the consent of the complainant; and the court further erred in failing to hold that, jurisdiction of the district court having been invoked on the ground that the suit involves an essential issue of federal law, or on the ground together with the diverse citizenship aforesaid, the suit could neither be brought in, nor removed to, the district court, unless the indispensable defendants, and all of them, were inhabitants of such district.

Fourth. The United States Circuit Court of Appeals, in and for the Sixth Circuit, erred in sustaining the motion of The New York Central and Hudson River Railroad Company to set aside the service of summons upon it by the sheriff of Cuyahoga County, Ohio.

191 Fifth. The United States Circuit Court of Appeals, in and for the Sixth Circuit, erred in holding that the service of summons in Cuyahoga County, Ohio, by the sheriff of that county, upon W. A. Barr as a regular ticket agent of the New York Central and Hudson River Railroad Company was insufficient to effect the general appearance of said defendant to this suit in the district court.

Sixth. The United States Circuit Court of Appeals, in and for the Sixth Circuit, erred in not holding that when the service of summons upon The New York Central and Hudson River Railroad Company had been set aside, said company thereafter entered its general appearance by its joinder in the signing of "Brief in Opposition to Remand,—Doyle, Lewis, Lewis & Emery, Solicitors for Defendants" filed December 1, 1915.

Seventh. The interlocutory judgment of the United States Circuit Court of Appeals, in and for the Sixth Circuit, entered on the 29th day of April, 1918, is erroneous and contrary to law.

Eighth. The final judgment of the United States Circuit Court of Appeals, in and for the Sixth Circuit, entered December 8, 1920, is erroneous and contrary to law.

Ninth. The United States Circuit Court of Appeals, in and for the Sixth Circuit, erred in holding that the *the* plaintiff, as a 192 private corporation, has no right to invoke the provisions of the Act of Congress of July 2, 1890, entitled "A Bill to Protect Trade and Commerce against Unlawful Restraints and Monopolies," otherwise known as the "Sherman Act," for the redress of its grievances against the appellees herein.

Tenth. The United States Circuit Court of Appeals, in and for the Sixth Circuit, erred in holding that the appellant was not in a position to invoke the provisions of Section 16 of the Act of Congress of October 15, 1914, known as the "Clayton Act," for the reason that the action had originally been commenced in the State Court.

Eleventh. The United States Circuit Court of Appeals, in and for the Sixth Circuit, erred in holding that the bill of complaint herein was insufficient and did not state a cause of action insofar as reliance therein was had upon the several constitutions and laws of the several states specifically set forth in said bill of complaint.

Twelfth. The United States Circuit Court of Appeals, in and for the Sixth Circuit, erred in affirming the decree of the Court below and in entering judgment against the appellant herein for costs.

Wherefore, the said appellant, General Investment Company, prays that the said orders and final judgment of the United States Circuit Court of Appeals, in and for the Sixth Circuit, be reversed and that such directions be given and decree made in respect to the matters herein referred to in favor of the appellant as prayed for in its several motions and pleadings hereinbefore mentioned with costs to be taxed against the appellees.

GENERAL INVESTMENT COMPANY,
By FREDERICK A. HENRY,
Attorney for Appellant,
Of SNYDER, HENRY, THOMSEN, FORD &
SEAGRAVE.

914 Williamson Bldg., Cleveland, O.

Bond on Appeal.

(Filed Feb. 7, 1921.)

Know all men by these presents, That we, General Investment Company, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto The Lake Shore & Michigan Southern Railway Company, Central Trust Company of New York, New York Central & Hudson River Railroad Company, William A. Read, Henry Evans and Willis D. Wood, in the full and just sum of Five hundred and no/100 Dollars, to be paid to the said The Lake Shore & Michigan Southern Railway Company, its certain attorneys, executors, administrators and assigns to which 194 payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 25th day of January, in the year of our Lord One Thousand Nine Hundred and Twenty-one.

Whereas lately at a session of the United States Circuit Court of Appeals in and for the Sixth Circuit, in a suit pending in said Court between General Investment Company, Appellant, and The Lake Shore & Michigan Southern Railway Company, Central Trust Company of New York, New York Central & Hudson River Railroad Company, William A. Read, Henry Evans and Willis D. Wood, Appellees, a judgment was entered on December 8, 1920, affirming a decree of the District Court of the United States, for the Eastern Division of the Northern District of Ohio, and dismissing the bill of complaint without prejudice as will more fully appear from said judgment, and the said General Investment Company having been allowed an appeal from said judgment of the United States Circuit Court of Appeals to the Supreme Court of the United States, and a citation directed to the appellees having been duly signed as provided by law.

Now, the condition of the above obligation is such that if the General Investment Company shall prosecute said appeal to effect

195 and answer all damages and costs if it fail to make its plea good then the above obligation to be void; else to remain in full force and virtue.

Dated January 25, 1921.

GENERAL INVESTMENT COMPANY,
By C. H. VENNER,
President.

Attest:

ROBERT E. QUIRK,
Secretary.

[SEAL.] AMERICAN SURETY COMPANY OF
NEW YORK,
By MARSHALL L. BROWER,
Resident Vice-President.

Attest:

F. G. MERRILL,
Resident Assistant Secretary.

Approved:

A. C. DENISON,
U. S. Circuit Judge.

Dated Feby. 7, 1921.

STATE OF ——,
County of ——, ss:

On the — day of — in the year 19—, before me personally came ——, to me known, who being by me duly sworn, did depose and say: that he resides in —, that he is the — President of —, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

196 STATE OF NEW YORK,
County of New York, ss:

On this Jan. 25, 1921 day of —, 191-, before me personally appeared Marshall L. Brower, Resident Vice-President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of New York; that he is Resident Vice-President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of

said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Marshall L. Brower further said that he is acquainted with F. G. Merrill and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said F. G. Merrill subscribed to the said instrument is in the genuine handwriting of the said F. G. Merrill and was thereto subscribed by the like order of the said Board of Trustees and in the presence of him the said Marshall L. Brower, Resident Vice-President.

[SEAL.]

H. M. HESS,
Notary Public.

197 Bronx County No. 25.
Register No. 2244.

Certificate filed New York County No. 256.

Register's —5.

Mingo County 142.

Certificate filed Queens, Richmond, Westchester & Ulster Co.
Term expires March 30, 1923.

Form G 337—30M, 10—20.

Authority of Signers for Surety.

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday January 20, 1920, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees, American Surety Company of New York.

"GENTLEMEN:

"The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, December 2, 1919, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

198 "We nominate for

Place.

Resident Vice-Presidents.

New York, N. Y.	Marshall L. Brower. A. E. Cottrell. William M. Tomlins, Jr. Lester S. Moore. W. H. E. Reinecke. C. S. Waterbury. Louis Papen. Samuel B. Brewster. C. E. St. John. Norvell H. Cobb. R. P. Luckett. Clark Reynolds. R. L. Neptune. C. C. Whitney.
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Resident Assistant Secretaries.

Marshall L. Brower. A. E. Cottrell. Charles S. Waterbury. Daniel Stewart. W. H. E. Reinecke. E. J. Sabater. Louis Papen. R. L. Neptune. M. E. McGuire. Geo. W. Acritelle. Charles A. Stumpf. Lester S. Moore. Clark Reynolds. F. G. Merrill.	Samuel B. Brewster. C. E. St. John. Willis E. McCurdy. William J. Spalkhaver. Wm. C. Sievers. R. P. Luckett. Peter H. May. E. A. Alley. Norvell H. Cobb. G. E. Hick. James J. Lucy. William Cheeks. Elmer H. Judson.
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* * * * *

"Whereupon, it was

"Resolved, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, how-

ever, to be attested in every instance by a Resident Assistant Secretary."

STATE OF NEW YORK,
County of New York, ss.

I, W. H. E. Reinecke, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the 200 whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 4th day of January, 1921.

[SEAL.]

W. H. E. REINECKE,
Assistant Secretary.

Preceipe for Transcript.

(Filed Feb. 7, 1921.)

To the Clerk:

You are requested to take a transcript of record to be filed in the United States Supreme Court pursuant to an appeal allowed in the above entitled cause and to include in such transcript of record the following, and no other paper or exhibits, towit:

I. All the printed record in cause No. 2939, entitled as above, including:

Transcript from Cuyahoga County Common Pleas Court.

Testimony of Wilburt A. Barr and L. A. Robinson taken orally in the Court of Common Pleas on the motion there heard to set aside service of summons, the transcript of which said testimony was offered and received in evidence on the hearing of the motion 201 to set aside service filed in the Dist. Court and stipulation respecting use of same.

Application for leave to file motion to set aside service and order granting such leave, with complainant's exceptions, and generally, in chronological order, all journal entries in the Dist. Court, with the complainant's exceptions.

Motion to set aside service filed in the Dist. Court.

Affidavit of W. A. Barr filed in Dist. Court in support of said motion.

Affidavit of Charles F. Daly filed in Dist. Court in support of said motion.

Motion to dismiss filed by The Lake Shore and Michigan Southern Railway Company.

Memorandum opinion on motion to quash service.

Motion for leave to file supplemental bill and to make new parties. Supplemental bill as tendered with said motion.

Motion for substituted process for the New York Central and Hudson River Railroad Company.

Affidavit of Clarence H. Venner in support of said motion.

Motion for substituted service on William A. Read, et al.

Affidavit of Clarence H. Venner in support of said motion.

202 Motion of plaintiff to remand cause to State court, with brief consisting of one paragraph filed therewith.

Brief in opposition to motion to remand (including front cover).

Memorandum opinion of Judge Killits on motion to remand.

Memorandum opinion of Judge Killits on dismissal.

Petition for appeal.

Assignment of errors.

Bond on appeal.

Citation.

II. All the printed record in cause No. 3425, entitled as above, (exclusive of duplications), including:

Decree and Mandate of the Circuit Court of Appeals, and the memorandum opinion and order of said court denying the application for a rehearing.

The motion of the defendant, The Lake Shore & Michigan Southern Railway Company, "to require the plaintiff to make its petition herein definite by inserting therein the date," etc.

The order of the court granting said motion.

Complainant's "Amendment to Petition."

Defendant's motion "to dismiss certain parts of the petition and the entire amended petition."

203 Complainant's motion to strike out paragraphs 2, 3, 4 and 5 of defendant's motion to dismiss.

The order and decree of January 20, 1920, denying complainant's motion and granting defendant's motion to dismiss, and the court's final dismissal of the bill as amended.

The petition for appeal and allowance thereof.

The assignment of errors.

The order allowing said appeal and assignment of errors, and fixing bond.

The bond on appeal.

The citation and United States Marshal's return.

The certificate of the clerk.

III. Opinion, decree and mandate of the Circuit Court of Appeals in said cause No. 3425.

You will please certify the foregoing to be printed in accordance with the rules of the Supreme Court of the United States.

FREDERICK A. HENRY,
Of SNYDER, HENRY, THOMSEN, FORD &
SEAGRAVE,
914 Williamson Building,
Cleveland, Ohio,
Solicitors for Complainant.

I acknowledge service of the foregoing by copy.

S. H. WEST,
Atty. for L. S. & M. S. Ry. Co.

Feb. 5, 1921.

204

Order Allowing Appeal.

(Filed Feb. 7, 1921.)

On reading the petition of the General Investment Company, the appellant herein, it is ordered that an appeal be and is hereby allowed to the said General Investment Company from the final judgment of the United States Circuit Court of Appeals, in and for the Sixth Circuit, entered December 8, 1920, and from the interlocutory judgment of said court entered April 29, 1918, to the Supreme Court of the United States in the case of General Investment Company, Appellant against The Lake Shore & Michigan Southern Railway Company, Central Trust Company of New York, New York Central & Hudson River Railroad Company, William A. Read, Henry Evans and Willis D. Wood, Appellees.

It is further ordered that the bond on appeal be fixed in the sum of Five Hundred (\$500.00) Dollars.

A. C. DENISON,
U. S. Circuit Judge.

Dated Feby. 7, 1921.

205 UNITED STATES OF AMERICA, ss:

To the Lake Shore & Michigan Southern Railway Company, Central Trust Company of New York, New York Central & Hudson River Railroad Company, William A. Read, Henry Evans and Willis D. Wood, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit wherein General Investment Company is Appellant and you are Appellees, to show cause, if any there be, why the decree rendered against the said Appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable A. C. Denison, United States Circuit Judge for the Sixth Circuit, this 7th day of February, in the year of our Lord one thousand nine hundred and twenty-one.

A. C. DENISON,
United States Circuit Judge for the Sixth Circuit.

[Endorsed:] Filed Feb. 11, 1921. Arthur B. Mussman, Clerk.

U. S. Marshal's Return.

Mar. No. 9775.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

Received this writ at Cleveland, Ohio, Febrary 9th, 1921, and on the same day at the same place. I served on S. H. West, Attorney of record for the within named, The Lake Shore and Michigan Southern Railway Company, Central Trust Company of New York, New York Central and Hudson River Railroad Company, William A. Read, Henry Evans and William D. Wood, Personally a true and certified copy hereof, with all endorsements thereon.

CHAS. W. LAPP,
U. S. Marshal,
By D. J. CONNOR,
Deputy.

Marshal's Fees.

Service	\$2.00
Travel06
<hr/> \$2.06	

206 United States Circuit Court of Appeals for the Sixth Circuit.

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in accordance with the preceipe for transcript filed herein February 7th, 1921, in the cases of General Investment Company, vs. The Lake Shore & Michigan Southern Railway Company, et al. Nos. 2939 and 3425, as the same remain upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, together with original citation.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 17th day of February, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Sixth Circuit.]

ARTHUR B. MUSSMAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 28,118. U. S. Circuit Court Appeals, 6th Circuit. Term No. 761. General Investment Company, appellant, vs. The Lake Shore & Michigan Southern Railway Company et al. Filed February 28th, 1921. File No. 28,118.

(3984)

U.S. Supreme Court, U. S.
FILED
MAR 3 1922
WM. R. STANSBURY
CLERK

NO. [REDACTED] 84

IN THE
Supreme Court of the United States

OCTOBER TERM, 1921.

GENERAL INVESTMENT COMPANY,

Appellant,

v.

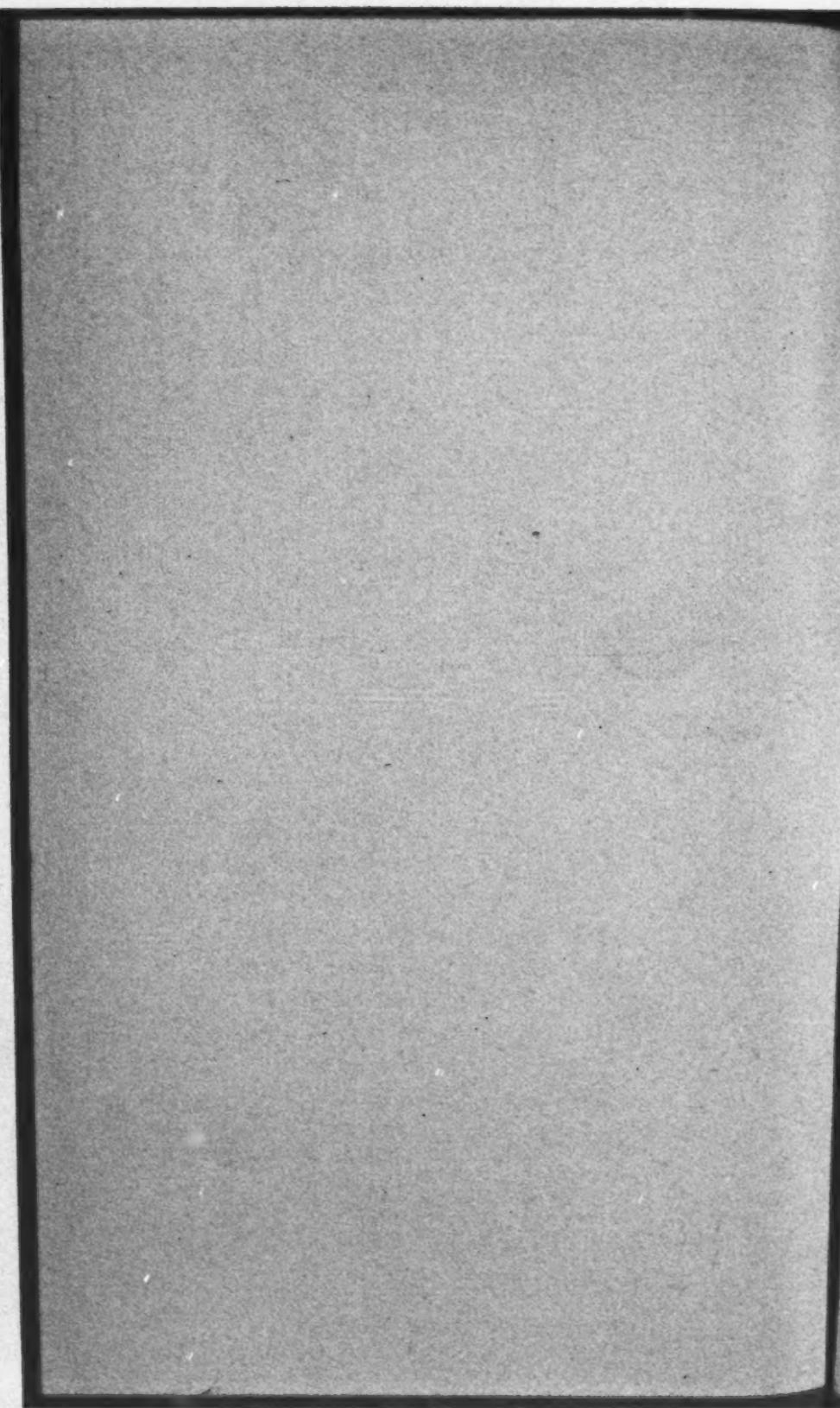
THE LAKE SHORE AND MICHIGAN SOUTHERN RAIL-
WAY COMPANY, ET AL.

Appellees.

BRIEF ON BEHALF OF THE APPELLANT.

FREDERICK A. HENRY,
ELIJAH N. ZOLINE,
Counsel for Appellant.

PRINTED BY FREMONT PAYNE, INC., 80 Washington St., New York City.



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Supreme Court of the United States

No. 235

(October Term, 1921.)

GENERAL INVESTMENT COMPANY,
Appellant,

vs.

THE LAKE SHORE AND MICHIGAN
SOUTHERN RAILWAY COMPANY,
et al.,

Appellees.

BRIEF FOR APPELLANT ON APPEAL FROM
THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT.

Statement.

This is an appeal to this court by the plaintiff below from the judgment of the United States Circuit Court of Appeals for the Sixth Circuit affirming the final decree dismissing the bill of complaint herein.

The jurisdiction of this court is predicated on the ground that in its bill in the court below the plaintiff expressly relied upon the Act of Congress of October 15, 1914, known as the Clayton Act, as well as on the Sherman Anti-trust Act, that the amount in controversy is in excess of \$5,000, and that jurisdiction of the court below did not depend entirely on diversity of citizenship.

On April 29, 1918, the United States Circuit Court of Appeals for the Sixth Circuit, rendered an interlocutory judgment reversing in part and affirming in part a judgment of dismissal of the appellant's suit in the United States District Court for the Northern District of Ohio, Eastern Division. Thereupon such further proceedings were had in the said District Court as resulted in a decree dismissing the residue of appellant's complaint; and, upon a second appeal, the said Court of Appeals, on December 7, 1920, affirmed said decree.

The action was begun in the Court of Common Pleas of Cuyahoga County, Ohio, where it was entitled "General Investment Company vs. The Lake Shore and Michigan Southern Railway Company, Central Trust Company of New York, New York Central and Hudson River Railroad Company, and William A. Read, Henry Evans and Willis D. Wood." The General Investment Company brought its suit as a stockholder of the Lake Shore and Michigan Southern Railway Company, on behalf of itself and of all other stockholders similarly situated against the New York Central & Hudson River Railroad Company, Lake Shore and Michigan Southern Railway Company et al., to enjoin a proposed consolidation of the two railroad companies last above named and nine other Railroad Corporations, and for other relief incident thereto (Rec., 21, 22).

The Bill.

The bill, called "petition" under the Ohio State practice, was filed on December 8, 1914, and aimed among other things to enjoin the voting of certain stock at the stockholders meeting of the Lake Shore and Michigan Southern Railway Company which was scheduled to be held on December 22, 1914, for the purpose of voting on the proposed consolidation sought to be enjoined in this action.

The petition (Rec., 3-23 inclusive), alleges in substance as follows:

(1) That the defendant, New York Central & Hudson River Railroad Company, a New York Corporation, then owned, and for many years prior thereto had owned, shares of capital stock, as follows, to wit:

452,892 shares of the par value of \$100 each of the 500,000 shares authorized capital stock of the Lake Shore & Michigan Southern Railway Company, a consolidated corporation of Pennsylvania, Ohio, Michigan, Indiana and Illinois.

\$16,819,300 of the \$18,738,000 outstanding capital stock of the Michigan Central Railroad Company, a corporation of Michigan.

\$10,000,000, the entire capital stock of the West Shore Railroad Company, a Corporation of New York, whose line of railroad from Weehawken, New Jersey, opposite the City of New York, to the City of Buffalo, New York, was and is leased to the said New York Central Company for a period of 475 years from January 1, 1886.

The entire \$1,000,000 capital stock of the Western Transit Company, a corporation of New York, operating a steamship line upon the Great Lakes.

\$13,604,000 of the \$19,000,000 capital stock of the New York State Railways Company, a Corporation of New York.

(2) That the defendant, Lake Shore & Michigan Southern Railway Company, then owned and for many years had owned, shares of capital stock, as follows, to wit:

More than \$15,000,000 par value of the \$30,000,000 outstanding capital stock of the New York, Chicago & St. Louis Railway Company, a corporation of New York, Pennsylvania, Ohio and Indiana.

\$30,207,700 of the \$57,056,300 outstanding capital stock of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, an Ohio Corporation.

\$11,870,000 of the \$23,680,000 outstanding capital stock of the Lake Erie & Western Railroad Co., an Ohio Corporation.

\$9,547,700 of the outstanding \$10,208,000 capital stock of the Toledo & Ohio Central Railway Company, a corporation of Ohio.

\$17,000,000 of the \$20,000,000 outstanding capital stock of the Chicago & Indiana Southern Railroad Company, a Corporation of the States of Indiana and Illinois.

(3) That the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, then owned and for a number of years had owned a majority, to wit: \$1,707,400 of the \$3,000,000 outstanding capital

stock of the Cincinnati, Northern Railroad Company, a Corporation of Ohio.

(4) That by reason of the stock ownership aforesaid, the said New York Central & Hudson River Railroad Company had caused to be elected a majority of its own directors as directors of the Lake Shore & Michigan Southern Railway Company, Michigan Central Railroad Company, New York, Chicago & St. Louis Railway Company, Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Lake Erie & Western Railroad Company, West Shore Railroad Company, New York State Railways Company and Western Transit Company and said majority of New York Central directors so elected constituted a majority of the board of each of said companies.

That the New York Central & Hudson River Railroad Company thereby has dominated and controlled, and at the time of the filing of the petition dominated and controlled the affairs, management and policy of all of said railroads and transportation companies in the petition named.

(5) That the lines of the New York Central & Hudson River Railroad Company and West Shore Railroad Company *are parallel and naturally competing between the Cities of New York and Buffalo in the State of New York in interstate and interstate commerce and with foreign countries.*

That the lines of railroad owned, controlled and operated by the Michigan Central Railroad Company, Lake Shore & Michigan Southern Railway Company, New York, Chicago & St. Louis Railway Company, and the steamship line of the Western Transit Company, *are parallel and naturally competing lines between the Cities of Buffalo, N. Y.,*

and Chicago, Ill., and that the lines of railroad of the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, are parallel and competing with the lines of the Lake Shore & Michigan Southern Railway and New York, Chicago & St. Louis Railway Company between the cities of Cleveland, Ohio, and Chicago, Illinois, and that said several lines of railroad are parallel and potentially competing with each other between numerous cities and towns in the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, as is more particularly set forth in the petition (see pages 6-9, of the record).

The petition further avers that the acquisition of the said shares of stock by the railroad companies above named was in violation of the Sherman Anti-trust Act, the Common Law and the Constitution and laws of the States of Pennsylvania, Ohio, Michigan, Indiana and Illinois and New York, where the lines of said roads are situated and the companies are organized and which prohibit directly or indirectly the consolidation of parallel and competing lines.

After reciting at length the routes of the railroads in question here, and the common control of the lines which through stockholdings, were illegally secured, the petition further charges that the defendants have conceived a plan for consolidating the lines of the New York Central & Hudson River Railroad Company with the lines of the Lake Shore Company and the merging of their corporate entities and have entered into a certain consolidation agreement, the details of which are set forth, which, if carried out, as the defendants threatened to do, would result in a loss to the Lake Shore Company in the sum of \$20,000,000 (Rec., 18). It is further alleged that the New York Central intends to vote

at Lake Shore stockholders meeting the shares of stock it illegally held therein; that said proposed consolidation of the Lake Shore Company with the New York Central Company, constituting as it will through stock ownership a virtual consolidation of several other parallel and competing lines engaged in commerce both in inter and intra-state, and with foreign nations, constitutes a violation of the public policies of the United States and of the State of Illinois, Michigan, Ohio, Indiana, Pennsylvania and New York, and of the common law of those states; a violation of the Sherman and Clayton Acts (which are pleaded); and a violation of the Constitution and laws of the states above named prohibiting the consolidation or merger of parallel and competing lines (Rec., 20), and which may subject the Lake Shore Company to penalties and forfeiture of its corporate charter and franchises.

The prayer is to enjoin the Lake Shore Company from entering into or consummating the proposed consolidation and for incidental relief.

*The Service of Process and Subsequent
Proceedings.*

The defendant Lake Shore and Michigan Southern Railway Company was duly served; and a service—of disputed validity—was also had on the New York Central and Hudson River Railroad Company. The latter company moved in the State Court to quash this service, and after both sides had offered evidence, the motion was overruled (Rec., 27). The State Court also denied plaintiff's motion for a temporary restraining order, holding that full relief could be granted on the final hearing (Rec., 27).

The consolidation was thereupon consummated *pendente lite*.

On January 8, 1915, the defendants Lake Shore & Michigan Southern Railway Company and the New York Central & Hudson River Railroad Company (the New York Central Railroad Company—the new consolidated corporation—which was not a party to the record, joining with them) filed their petition for removal to the District Court of the United States for the Northern District of Ohio. Said petition for removal was based on the ground that this is a suit of a civil nature arising under the Constitution of the United States and the Anti-trust Laws of the United States, i. e., the Sherman and Clayton Acts, and also on the further ground that a separable controversy exists as to the petitioning defendants (Rec., p. 34).

Thereafter, on March 4, 1915, the New York Central & Hudson River Railroad Company, by leave of the United States District Court, filed a new motion to set aside the service of summons (Rec., 54, 55). Evidence offered in the State Court was, by stipulation (Rec., 40, et seq.), re-offered, and the motion to quash was granted (Rec., 59; see also opinion of Killits, J., Rec., 57).

Meanwhile, the Lake Shore & Michigan Southern Railway Company on March 5, 1915, filed its motion to dismiss the petition (Rec., 56).

Thereafter, on August 16, 1915, plaintiff filed motions for leave to file a supplemental bill and for substituted service on the New York Central & Hudson River Railroad Company and other defendants (Rec., 59, et seq.).

On October 29, 1915, plaintiff filed a motion to remand the cause to the State Court (Rec., 71).

In the last motion the plaintiff expressly requested the District Court to determine the question of the propriety of the removal before passing upon its other motions. This request was complied with, but the motion to remand was overruled (Rec., 99).

Thereafter, the Court refused the plaintiff's motions for leave to file supplemental bill and for substituted service, and granted the motion of the Lake Shore & Michigan Southern Railway Company to dismiss the petition (Rec., 100, et seq.).

By said supplemental bill (Rec., 60-67), the Court was advised of the fact that since the filing of the original bill, the consolidation became consummated and that the New York Central Railroad Company, the new amalgamated railroad corporation, had been incorporated under the laws of New York, Pennsylvania, Ohio, Michigan and Illinois. In this connection, we beg to observe that the consummation of the consolidation and the incorporation of the new company in the states above enumerated is also pleaded by the defendants in their petition for removal above set forth (Rec., page 33).

The motion to dismiss the bill having been granted, the plaintiff appealed from the final decree of the U. S. District Court to the United States Circuit Court of Appeals for the Sixth Circuit, assigning error upon each of the foregoing rulings. On that first review, the said U. S. Court of Appeals in substance sustained, as to certain portions of the original complaint, the error assigned on the dismissing of the petition, and it reversed the judgment of the District Court (Rec., 129) as indicated in the following directions, *viz.*;

"in so far as it dismissed those portions of the original petition wherein it was sought to en-

join the Lake Shore Company from entering into the proposed agreement and consolidation and to have receivers appointed of the stock owned by it in its various subsidiary companies, and decrees made for their disposition and management, and in so far as it awarded against the plaintiff the general costs of the cause * * * but such reversal is with leave to the Lake Shore Company to hereafter move in the District Court to dismiss so much of the original petition as sought to enjoin the Lake Shore Company from entering into the proposed agreement and consolidation on account of the alleged violation of the Federal Anti-trust Act; and except, further, that in so far as the decree dismissed the remaining portions of the petition, it is modified so that the dismissal, being for want of indispensable parties, is without prejudice."

In afterwards denying this appellants' motion for a rehearing on said first appeal, the Circuit Court of Appeals stated that (Rec., 129, 130)

"neither the opinion nor the leave granted the Lake Shore Company to hereafter move to dismiss so much of the original petition as relates to the alleged violation of the Federal Anti-trust Act, related or referred in any manner to so much of the petition as independently alleged that the proposed consolidation of railroads would be in violation of the Clayton Act. There is no ground to anticipate that the District Court may regard the opinion or judgment herein as either stating or intimating that so much of the original petition should be dismissed as seeks to enjoin a violation of the Clayton Act."

After the cause was thus remanded, the Lake Shore & Michigan Southern Ry. Co. filed its motion to require the plaintiff to insert in its petition the date of the agreements of consolidation adopted by the directors of the defendant and the other corporations entering into said consolidation agreement (Rec., 130, 131). The plaintiff contended that this motion was an unauthorized variation from the leave given by the Court of Appeals, but the motion was granted and the amendment was filed accordingly.

Thereupon the same defendant filed a motion to dismiss by piecemeal and as a whole the plaintiff's petition and amendment thereto (Rec., 132, 133). To this, the plaintiff interposed a "motion to strike out portions of defendant's motion to dismiss" (Rec., 134), upon the ground that it exceeded the authority so to move which had been defined in and limited by the opinion and orders of the Court of Appeals as above quoted. Plaintiff's motion was refused and defendant's motion to dismiss was granted (Rec., 135).

On a second appeal taken to the U. S. Circuit Court of Appeals, each of these rulings was assigned as error, but the Court held (Rec., 147):

"The decree below should be affirmed; but, as we rest the affirmance in part upon an insufficiency of pleading—as to the state constitutions and statutes and the damages—the affirmance will be without prejudice to the filing in a proper court of a new bill based upon those constitutions and laws only."

The present appeal brings the entire case and all the rulings thereon for review to this Court,

and is founded upon assignments of error (Rec., 148, 149) which raise anew in this court all the foregoing questions including the question of the sufficiency of the bill upon any theory therein set forth.

Errors Relied Upon.

1. Error in affirming the refusal to remand the cause of the State Court. (Assig. of Error, #1, 2, 3, 7 and 8, Rec., 148.)
2. Error in affirming the quashing of the service of summons upon the New York Central & Hudson River Railroad Company. (Assig. of Error, #4, 5, 6, 7 and 8, which include the error in affirming the refusal of leave to file a supplemental bill and to allow substituted service under Code Section 57.)
3. Error in affirming the dismissal of the bill which directly involved *inter alia* the construction and application of the Sherman and Clayton Anti-trust Acts, and in holding that, as the State Court had no jurisdiction to entertain a suit under the Clayton or Sherman Acts, the Federal Court on removal was likewise without jurisdiction. (Assig. of Error, 9 and 19, 7 and 8, Rec., 149.)
4. Error in affirming the dismissal of the bill on the ground that it did not state a cause of action under the Constitutions and statutes of the several States mentioned in the bill of complaint. (Assig. of Error, 11 and 12, Rec., 149.)

ARGUMENT.

I. Plaintiff's motion to remand the cause should have been granted.

(*Jurisdiction herein of the particular District Court*).

When the jurisdiction of the federal courts is based upon a *federal question alone*, or on both diversity of citizenship and a federal question, the suit cannot be brought in or removed to the United States District Court unless all the indispensable defendants are inhabitants of such district.

Federal Judicial Code, Secs. 28, 29, 37 and 51.

Male vs. Atchison etc., Ky. Co., 240, U. S., 97;

Macon Grocery Co. vs. Atlantic etc. Ry. Co., 215 U. S., 501;

Smith vs. Lyon, 133 U. S., 315, 319;
Simkins' "A Federal Suit in Equity,"
91, 94, 95 and 876;

10 Ill. Law Rev., 99 (June, 1915), "Jurisdiction and Venue in Federal Courts."

Plaintiff is a citizen of Maine. The Lake Shore & Michigan Southern Railway Co., is a citizen of Ohio and of the other states in which its line between Buffalo and Chicago runs. The New York Central & Hudson River Railroad Co., is a citizen of New York alone. The basis for removal was that the suit involves *inter alia* federal questions under the Sherman and Clayton Acts (Rec. 34). The joint petition for removal filed by the two defendant railroads and also (though it was no party to the suit) by the consolidated corporation that was attempted to be created therefrom *pendente lite*, alleges (Rec. 33, 34), the *same citizen-*

ship for the new company as that of the Lake Shore; avers that these "petitioners are alone interested in the controversy with the plaintiff as to the proposed consolidation," and as to its being "in violation of the laws of the United States," and as to "the question of the construction" thereof; and further alleges "that such questions are separable" from any other matters in plaintiff's "petition or in the prayer thereof."

It is submitted that on the joint petition of a resident and a non-resident defendant in a case involving a federal question, no order of removal could lawfully be made. The Lake Shore, it is true, by showing a separable controversy, might itself have effected a removal. Its co-defendant, however, had not that right, either joint or separable. Neither could the Lake Shore alone, if the N. Y. C. & H. R. R. Co. was, as they both claimed (Rec., 81, 91, 92)—but plaintiff always denied—an indispensable party defendant. Nor did the joining in the removal petition by the new consolidated company cure any defect for the reason that the newly created New York Central E. R. Co. was, like the Lake Shore & Michigan Southern Railway Co., a corporation of Ohio and other states.

The defendants sought in the U. S. District Court to have the court predicate the overruling of plaintiff's motion to remand on the ground that the latter had waived its objection to the venue. *But the District Court did not take this view* (Rec., 99), and the overruling of the motion was placed on other untenable grounds, viz., that the fact that complainant had chosen to join a resident corporation as party defendant, takes the case out of the class where, because both complainant and defendants are non-resident of the district, juris-

dition in the Federal Court by removal from the State Court depends upon the consent of the plaintiff.

The U. S. Circuit Court of Appeals, however, adopting the defendants' view (Rec. 113, 114), held that the complainant, by waiting until after the District Court had sustained the motion of the non-resident defendant, the New York Central & Hudson River Railroad Co., to quash the service, and by joining in the stipulation that evidence used in the Common Pleas might again be used in the District Court (Rec., 40, 41), had impliedly consented to the removal and accepted the jurisdiction of the Federal Court of the particular district. Such consent was further held to result from the pendency of the Lake Shore & Michigan Southern Ry. Co.'s motion (Rec., 56, 57) to dismiss the bill for want of equity and because its co-defendant, service on which had thus been quashed, was an indispensable and non-resident party, and from the pendency also of motions by complainant (Rec., 59, 67, 69) for leave to file a supplemental bill and for substituted service on non-resident defendants.

It should, however be borne in mind that the U. S. District Court had not yet acted on any application by the plaintiff when the latter moved "the court, before passing upon the several motions herein filed, to remand the above entitled cause to the State Court" (Rec., 71, 72). It is only a joinder of issue on "the merits" that this court has held amounts to a waiver of objections to the jurisdiction of the particular District Court.

Western Loan & Savings Co. vs. Butte & Boston Con. Mining Co., 210 U. S., 368;

United States vs. Hoosier, 237 U. S., 1;
Arizona & N. M. Ry. vs. Clark, 235 U. S.,
669, 674;
Kreigh vs. Westinghouse, Church, Kerr &
Co., 214 U. S., 249.

Here the matter decided after the removal, viz., invalidity of service on the New York Central and Hudson River Railroad Company, was a matter on which the defendant and not the plaintiff had invoked the action of the court. When a plaintiff is brought into Federal Court against his will, it should require something more than a merely passively defensive attitude towards interlocutory motions filed by defendants to commit such plaintiff irrevocably to a waiver of his right to have the case remanded.

In the peculiar circumstances here, no such waiver could in any event result. Logically, no earlier motion to remand was admissible. In the U. S. District Court the complainant could not consistently have urged any want of jurisdiction of that particular court, except by way of retort to the contention (first disclosed by the defendant's motion to dismiss), that the non-resident defendant, whose motion to quash service had been sustained, was an indispensable party. If that contention were sound, then this particular District Court had no jurisdiction without mutual consent. Otherwise there was no valid ground for questioning such jurisdiction. Plaintiff contended and still contends that the resident defendant, the Lake Shore & Michigan Southern Railway Company, was the only really indispensable party defendant. Complainant's petition alleges that "it brings this suit on behalf of itself and all other similarly situated stockholders of the Lake Shore Company who may join herein" (Rec., 18). The

complaint is thus a stockholder's bill against a corporation of the State of Ohio. The prayer asks for some nine items of relief, but the outstanding feature to which all else is subordinate or incidental is embraced in the second paragraph of the prayer (Rec. 21), viz., to enjoin the Lake Shore Company from consummating the proposed consolidation. This the removal petition concedes (Rec., 33, 34).

The Lake Shore, being in this view the only indispensable party defendant, its domicile in Ohio and in the district aforesaid was alone sufficient and alone pertinent to fix the Federal Court venue there; and the case, involving a federal question, would of course be removable to the Federal Court of said district.

Geneva Furn. Mfg. Co. vs. S. Karpen & Bros., 238 U. S., 254, syl., 3.

It was not until (on the motion to dismiss, among other grounds, for want of parties) the defendant railroad companies began to contend in the District Court that the New York Central & Hudson River Railroad Company was an indispensable party (notwithstanding the plaintiff's contrary theory), that it then became time, in view of such contention, for the plaintiff to raise the question of the rightfulness of the removal to the Federal Court of a district of which the New York Central & Hudson River Railroad Company was not an inhabitant. In advance of the making of such contention by defendants, the plaintiff would have been utterly inconsistent had it urged that the New York Central & Hudson River Railroad Company was an indispensable party defendant to the suit, and that, because in such suit (involving a federal question), such defendant was not an inhabitant of the Northern District of Ohio, the cause must be remanded.

On the contrary, the plaintiff was entirely consistent in entering into stipulation (Rec. 40) concerning the evidence on the motion to quash without first interposing a motion to remand. The question of quashing the service of summons on the New York Central & Hudson River R. R. Co. was such that, if the service were sustained, that company would be bound by the decree; but if the service were quashed no other result would follow than that the New York Central & Hudson River Railroad Co. would not be concluded by the final decree on the merits. In either case adequate relief to accomplish the whole object of the suit might be had against the Lake Shore alone.

Erie R. R. Co. vs. Kennedy, 191 Fed., 332.
Blatchford vs. Ross, 54 Barb. (N. Y.) 42.

In maintaining therefore a passively defensive attitude towards the New York Central & Hudson River Railroad Co.'s motion to quash, the plaintiff was not waiving its right to move thereafter that the suit be remanded to the State Court. *Waiver imports voluntary choice, and then there was no such choice that plaintiff could consistently exercise.*

Farlow vs. Ellis, 15 Gray (Mass.), 229.

In circumstances like these (and the question is one that must turn on the controlling circumstances rather than on the application of any hard and fast rule), no court has ever held that a plaintiff, after removal by a defendant of the cause to which they were parties, impliedly forfeited before actual joinder of issue on the merits, his right to move for a remand. Indeed, the New York Central & Hudson River Railroad Co., by filing and prosecuting to a decision in the State Court its motion to

quash the service of summons, had itself irrevocably waived its right to remove the cause to this particular District Court which could have no jurisdiction except by the mutual consent of all parties concerned. Being outside the letter of the statute, the right of removal under these conditions is imperfect, and is surrendered by any recognition of the State Court's authority; and the prior submission of any issue by both parties to the decision of the State Court must constitute a final election of that tribunal which not even the concurrence of both parties may, by subsequent removal proceedings, and in derogation of the dignity of that court, revoke.

II. The acquiring of jurisdiction of the person of the New York Central and Hudson River Railroad Company.

The District Court erred in quashing the service of summons upon the New York Central & Hudson River Railroad Company (Rec., 57, 59), and the Court of Appeals erred in affirming this ruling, and also in holding that this corporation had not entered its voluntary appearance (Rec., 114-118). And in the same connection, it is submitted that the Court erred in refusing to allow the plaintiff below to file its supplemental petition, showing that the scheme charged in the original bill has been consummated, and to secure substituted service under Code Sec. 57.

1. *Voluntary Appearance by Removal to Wrong District Court.*

The New York Central & Hudson River Railroad Company could not by joining in and filing the pe-

tion for removal at once waive the wrong venue in the Federal Court and withhold waiver of the jurisdiction of that Court over its person for any and every purpose.

Rakauskas vs. Erie Ry. Co., 237 Fed., 495; *Woodcock vs. B. & O. R. R. Co.*, 107 Fed., 767; *Bushnell vs. Kennedy*, 9 Wall., 387, 394; *Hinds vs. Keith*, 57 Fed., 10; *Western Loan & Savings Co. vs. Butte & Boston Mining Co.*, 210 U. S., 368, 372; *Ex parte Wisner*, 203 U. S., 449, 460-1, quoting from *Kinney vs. Columbia Savings & Loan Assn.*, 191 U. S., 78, 82; *Pollard vs. Dwight*, 8 U. S., (4 Cranch), 421, 428-9.

Where a defendant not merely fails to object to the wrong venue, but by removal petition seeks it, he is then in no position to question the District Court's complete jurisdiction of his person. Having invited his adversary to accept a jurisdiction which required mutual consent for it to attach to their respective persons, he cannot thereafter detract from his own entire submission to it. Defendant's brief in the Court below reprinted in this record and made a part of the same, virtually concedes this (Rec., 87).

2. *Voluntary Appearance by Joining in Stipulation*—If the contention already noticed were sound, that the complainant waived its right to remand by joining in a stipulation for the use in the District Court of the evidence adduced in the Court of Common Pleas before the removal, it must be equally clear that the New York Central & Hudson

River Railroad Co., by becoming a party to the same stipulation, effected an entry of its own general appearance to the action (Rec., 40). It will be observed that the stipulation is general, and not restricted by its terms to the admissibility of this evidence on the renewed motion to quash merely. So far as competent and relevant, it is made admissible for any purpose in the case. If, as the Court of Appeals held, this stipulation accomplished a general appearance in the District Court by the plaintiff, it could have done no less for the defendant, the New York Central & Hudson River Railroad Co., also.

3. Voluntary Appearance by Joining in Brief Filed—A general entry of appearance by the same defendant (N. Y. Central) was again effected when it joined in the filing in the District Court of the defendant's (Lake Shore) brief which, for the consideration of this point, is reproduced in full in the transcript (Rec., 72-98). Though denominated a "brief in opposition to motion to remand," it *argues and asks for the dismissal of the case on the merits pursuant to the application of the Lake Shore Company to that end, which was also pending at the same time.* The renewed motion to quash had then already been granted in the District Court, so that the New York Central & Hudson River Railroad Co. had no further occasion to intermeddle in the case, and of course could not do so without appearing generally. The only remaining defendant that had been served with process was the Lake Shore Company. The said stipulation as to testimony is signed generally by the attorneys for plaintiff and by "Doyle, Lewis, Lewis & Emery," attorneys for the New York Central & Hudson River Railroad Co. (Rec., 41); and the same firm as "solicitors for defendants" en-

dorsed and signed said brief. That the use of the plural "Defendants" in the signature to the brief was not an inadvertence as to the fact of its speaking not only for the Lake Shore but for the New York Central & Hudson River Railroad Co., as well, appears from the concluding language of the brief (Rec., 98), viz., "We submit therefore that the motions to remand should be overruled, and that for the reasons set forth in our former brief the motion of the Lake Shore to dismiss the General Investment Company case should be granted. Doyle, Lewis, Lewis & Emery, Solicitors for Defendants, Walter C. Noyes, Samuel H. West, Chas. T. Lewis, Counsel."

Charles T. Lewis was attorney for the New York Central & Hudson River Railroad Co. So far as disclosed by this record, only he or his firm had signed for or represented that defendant (Rec. 25, 25, 26, 36, 39, 41, 55). Walter C. Noyes and S. H. West were solicitors for the Lake Shore (Rec. 36, 39, 57, 133). Wherever the separate corporate names of these two defendants were signed to the same paper, this distinction was preserved (Rec. 36, 39). This is true of the removal petition and of the bond. So the motion in the District Court to set aside service is signed by "Chas. T. Lewis, Attorney for Defendant the New York Central and Hudson River Railroad Company"; whereas, the motion to dismiss is signed "Walter C. Noyes, S. H. West, Solicitors for the Lake Shore and Michigan Southern Ry. Co." But where both of these defendant companies jointly execute any document, without however signing or distinguishing their respective names, one or more of both groups of attorneys signed together as representing the "Defendants" (Rec. 37, 72, 98). Nowhere does Mr. West appear for the New York Central & Hud-

son River Railroad Co. alone. At the outset they meticulously define and limit their respective appearances. Now, when the Lake Shore was the only defendant before the court on which they claim valid service of summons had been made, what is to be inferred when, on behalf of the "Defendants," all these attorneys join in a "brief in opposition to motion to remand"? The plain inference is that the New York Central & Hudson River Railroad Co., being unwilling to have the cause remanded, joined with its co-defendant the Lake Shore to oppose it. If Mr. Lewis and his firm had meanwhile come to represent the Lake Shore, it was most singular that in signing this brief they did not specifically limit such new appearances accordingly. They should have been astute to exclude the old client and to include only the new one. In fact, however, they signed as attorneys for both. It might be easy to account for the use of this word "Defendants" on the theory of inadvertence, or because the brief was filed for the Lake Shore as the sole remaining defendant in each of two suits, were it not that Mr. Lewis had theretofore represented not the Lake Shore at all but only the New York Central & Hudson River Railroad Co. Furthermore, all the attorneys who had been representing either defendant were now signing a single paper together in circumstances that could not fail to recall the careful distinction of their respective appearances which they had previously observed without exception.

Still further, the brief itself discloses by internal evidence that it speaks for the New York Central & Hudson River Railroad Co. as well as for the Lake Shore when, for example, it recites (Rec., 80) that "the defendants are entitled to the opin

ion and judgment of the Federal court," and again (Rec. 81) that "there are now no defendants in court, except those so joined in the petition for the removal. At the time of filing the petition, and now, the Lake Shore and the New York Central were and are the only defendants in the suit," etc. The brief further recites (Rec. 86) that "The New York Central and Hudson River Railroad Company had the right to remove," etc., and after contending (Rec. 91, 92) that "the New York Central is an indispensable party to the issue relating to consolidation," the brief concludes with the exhortation (Rec. 98) "that for the reasons set forth in our former brief, the motion of the Lake Shore to dismiss the General Investment Company case should be granted." These excerpts show that the New York Central & Hudson River Railroad Co., through its own attorneys, Doyle, Lewis, Lewis & Emery, was consciously participating in the argument against the plaintiff's motion to remand and for the Lake Shore's motion to dismiss.

4. *Service of Summons*—Underneath all this lies the personal service of summons upon the New York Central and Hudson River Railroad Co., which affords at least colorable jurisdiction of the person of this defendant, and the validity of which was upheld by the state court, after a review of all the authorities which throw light upon a proper construction of General Code of Ohio, Sec. 11,268 (see also R. S., 5041; 75 O. L., 614, amended in 76 O. L., 145; 95 O. L., 258; General Code 11,288); which provides, "* * * If such corporation is a railroad company, whether foreign or domestic, and whether the charter thereof prescribes the manner and place, or either, of service

of process thereon, * * * the summons may be served upon any regular ticket or freight agent of such railroad company * * * "

The return of the sheriff of Cuyahoga County was entirely regular and sufficient (Rec. 24). In the recent decisions of this court, the idea that the physical presence or existence of railroad tracks or other property in a state is requisite to the doing of business in such state, is discountenanced.

St. Louis S. W. Ry. Co., of Texas vs. Alexander, 227 U. S., 218;

International Harvester Co. of America vs. Commonwealth of Kentucky, 234 U. S., 579;

Washington-Virginia Railway Co. vs. Real Estate Trust Co., of Phila., 238 U. S., 185.

The decision of the Ohio Court, if not controlling, is at least persuasive on the question of service under the Ohio Statutes.

The question turns in each case upon the facts proved.

See also

In re Hohorst, 150 U. S., 653;

N. Y., L. E. & W. R. R. Co. vs. Estill, 147 U. S., 591;

and for service under the Clayton Act in a foreign district,

Southern Photo Material Co. vs. Eastman Kodak Co. of N. Y., 234 Fed., 955;

also a decision by Judge Walter C. Noyes, now of counsel for defendants.

Sleicher vs. Pullman Co., 170 Fed., 365

The Ohio cases on this point are:

Pa. Co. vs. Loftis, 72 O. S., 288, Syl. 2;
Pullman Co. vs. Willett, 7 O. C. C. (N. S.), 173;
B. & O. R. R. Co. vs. McPeek et al., 16 O. C. C., 87, syl. 1.

The defendants' removal petition alleges (Rec. 32) that the New York Central & Hudson River Railroad Co., whose line is wholly within the State of New York, form with the Lake Shore, "a connected and continuous line of railroad," from New York to Chicago, "and that each of them have been and are now largely and continuously engaged in the transportation of interstate traffic."

The witness Barr, on whom, as ticket agent for the New York Central & Hudson River Railroad Co., the service was had, testified (Rec. 42) that he was "in chief charge of the ticket office" where for three years had been sold "thousands of coupon tickets calling for passage over the Lake Shore and Michigan Southern Railway Company to Buffalo, and thence onward over the New York Central and Hudson River Railroad Company to various points in the State of New York." The ticket in evidence (facsimile facing Rec. 52) bearing on its face the names of both companies, is on the back stamped and watermarked "New York Central Lines" and the same phrase is also painted on the door of his ticket office in Cleveland. Barr says further (Rec. 42) that "New York Central Lines" "signifies a group of railroad companies or systems," including the Lake Shore & Michigan Southern Railroad Company, the New York Central & Hudson River Railroad Company and others. The date stamp aforesaid reads "New York Central Lines—Dec. 14, '14—City Ticket Office, Cleveland, O."

Their time tables show a map labeled "New York Central Lines, 'America's Greatest Railway System,' Operating More than 13,000 Miles of Railway East of Chicago, St. Louis and Cincinnati. Comprising the New York Central and Hudson River, Lake Shore and Michigan Southern," etc., etc. "Through trains running between Cleveland or between points west of Cleveland on the Lake Shore and Michigan Railway to a destination in New York City over the New York Central and Hudson River Railroad" had "been running for years without breaking bulk" in the "passenger service" (Rec. 43).

L. A. Robinson, general passenger agent of the Lake Shore & Michigan Southern Ry. Co., testified that "New York Central Lines" appears on the equipment of rolling stock of each of the railroads; that it is "our trade mark and is used by all of the New York Central Lines" and "on nearly everything we can get it onto" (Rec. 50).

Mr. A. H. Smith is president of both companies (Rec. 49), and the two railroads with others of the system claim to have consummated a consolidation within three weeks after the petition was filed (Rec. 33, 34). The coupon tickets over both of the defendant railroads are recognized, "honored" and "authorized" by each (Rec., 42, 48); the ticket in evidence purports by the printed matter on its face to be sold by an agent "of the connecting line (the New York Central and Hudson River Railroad Company)," and it was bought "at the ticket office of the New York Central Lines situated in the Hippodrome Building, Cleveland, Ohio" (Rec., 53).

It is true Barr swears he was neither hired nor paid by the New York Central & Hudson River

Railroad Co., nor did he report to it, and that similar coupon tickets were sold to places not on the "New York Central Lines." But the previously cited evidence and the statements of fact to the same effect in the return to the sheriff (Rec., 24), show a special connection and mutual relationship, and a peculiar identity of interest and reciprocal agency between the two defendants.

St. Louis Southwestern Ry. Co. of Texas
vs. Alexander, 227 U. S., 218, and Reynolds *vs.* M. K. & T. Ry. Co., 255 U. S., 565, *approving* St. Louis Southwestern Ry. case, *supra*.

5. *Substituted Service Under Code Section 57*—The District Court erred in refusing leave to plaintiff to file a supplemental bill and to obtain service under Code Sec. 57; and the Court of Appeals erred in affirming such refusal.

If it be argued that the rights of the N. Y. C. & H. R. R. Co., were already so far involved in the subject matter of this action, even though the proposed consolidation was not yet consummated at the time this suit was commenced, as to make it then an indispensable party, it is still to be borne in mind that a large part of the property involved in such consolidation was and is within the Northern District of Ohio so as to be subject to the jurisdiction of the District Court by substituted process under Section 57 of the Judiciary Act in order to warrant the removal of the cloud created thereon by the accrual and assertion of such adverse rights. In this aspect, it is immaterial that the cloud has since become still more menacing.

From the things threatened, as set forth in plaintiff's original petition filed in the State court, and by reason of the consummation thereof *pendente*

lite, the prospect of which is also alleged therein, the ownership of the property of the Lake Shore in Ohio (as well as in other states), which was in its possession when this action was begun, and title to which we contend is still in that company has become invested with a cloud.

This suit, for the two reasons already discussed, being one within the jurisdiction of the Federal courts; and the two railroad companies, that were original parties defendant, having invoked such Federal jurisdiction in this particular district; it follows that the N. Y. C. & H. R. R. Co. (the personal service on which was quashed by the District Court) might thereafter have been served with process therein in any mode by which it could lawfully be reached.

The original petition, having stated a cause of action, was maintainable provided all indispensable parties were in court. The supplemental bill, leave to file which was erroneously refused, if the N. Y. C. & H. R. R. Co. were an indispensable party (Rec., 100), alleges nothing inconsistent therewith, but simply shows to the Court the developments of fact predicted in the original petition and actually occurring since the suit was begun. This is precisely the office of a supplemental bill. If, however, the unfolding state of facts be deemed to have given rise to a distinct cause of action or ground for relief, then it should be read together with the petition as a bill in the nature of a supplemental bill under old Equity Rule 57, succeeded now by the new Equity Rules 34 and 35.

Under the old Rule 57 it is said (Simkins' A Federal Equity Suit, page 373) that "pure supplemental bills are but continuations of the original bill, and used as amendatory process to cure matters

which render the original bill defective; but a bill in the nature of a supplemental bill is in effect an original bill, beginning as it were, a new suit, which simply draws to itself the advantages of the proceedings under the original bill and to that extent is supplementary."

This effectually disposes of the objection (supported by no authority whatever) that a bill praying relief *in personam* cannot be supplemented so as to support a prayer for relief *in rem*, provided the general purpose of the original bill is pursued and the tenor of its allegations followed in setting forth developments *pendente lite*. *Fitzgerald, etc., Construction Co. vs. Fitzgerald*, 137 U. S., 98, at page 105; *Consol. Interstate Callahan Mining Co. vs. Callahan Mining Co. et al.*, 228 Fed., 528.

To such a situation, in a proper state of facts, Sec. 57 of the new Judicial Code applies in letter and spirit "to remove any incumbrance or lien or cloud upon the title to real or personal property within the district," or (Sec. 55) "partly in one district and partly in another." The original petition recited the location of the property and prayed, if the consolidation should be consummated *pendente lite*, that it be set aside. The supplemental bill, alleging that it has been consummated, prays that the resulting cloud on such part of the property as lies in Ohio be removed.

Though a bill pray for relief additional to that which can be had upon substituted service, it is maintainable *pro tanto*.

Porter Land and Water Co. vs. Baskin,
48 Fed., 323;
DuPont vs. Abel, 51 Fed., 534.

It is true that in the unreported Spencer case in Michigan, the District Court, on July 30, 1914, ruled (erroneously) that a somewhat similar

"suit was not commenced to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien, or cloud upon the title to the real or personal property, within this district where this suit is brought, within the true intent and meaning of Sec. 57 of the 'The Judicial Code,' and the said New York Central and Hudson River Railroad Company is and was not an inhabitant of, or found within, this district, and has not voluntarily appeared to this suit."

The fact that under the limitations as to service of process with which plaintiff was confronted below, it felt obliged to narrow its application for relief to such as might be obtained *in rem* against absent but indispensable defendants, did not involve a change of position or a departure from the objects originally sought. The relief finally asked is identical so far as it goes with the relief originally asked. Nor is it any valid objection, to stigmatize the relief sought as incidental to the broader remedy which was first sought.

The case of *L. & N. R. R. Co. vs. Western Union*, 234 U. S., 369, distinctly recognizes the jurisdiction of the Federal courts under Section 57 of the Judicial Code to treat that as a cloud within the territorial limits of any state which either the letter of the statute of such state declares to be a cloud, or which the courts, in the administration of the state law, have held to be a cloud. Under the statutes and decisions of Ohio, the state of facts set forth in the plaintiff's original petition and in the supplemental bill constitutes a cloud upon property within this state.

On general principles of equity a suit will lie in a proper case as well to enjoin the threatened crea-

tion of a cloud as to remove one that is already fully consummated. *West Portland Homestead Association vs. Lownsdale*, 17 Fed., 614; *King vs. Townshend*, 141 N. Y., 358; 32 Cyc., 1296-7 and 1325.

But under the laws and decisions of Ohio, jurisdiction in equity to quiet title by action which may be in the nature of a proceeding *in rem* (General Code, Sec. 11,292, subdivision 9, and 11,901), extends to inchoate clouds; and as held in *Holland vs. Challen*, 110 U. S., 15, "an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the state" in such cases.

In Ohio, under General Code, Sections 9029 and 9038, a railroad consolidation, operates as a conveyance of all property of the constituent corporations to the resultant corporation upon the filing of the agreement therefor with the Secretary of State; but before such agreement was so consummated *pendente lite* in the present case, the agreement for consolidation under the allegations of the petition concerning the majority holding of stock by the New York Central & Hudson River Railroad Co., in the Lake Shore & Michigan Southern Ry. Co., and the settled purpose to vote the same in favor of such consolidation and to consummate the agreement therefor, constituted a cause within the meaning of General Code, Section 11901.

In *Burnet vs. Corporation of Cincinnati*, 3 O. R., 73, the Court, construing the Ohio statute and holding that "equity may interpose by injunction to stay sale for taxes on city lots, assessed by the city council of Cincinnati," said, at page 88:

"The defendants concede that if a sale were made this bill might be sustained under our statute. To sustain it now is clearly within its

letter. A claim is set up, not to enter in and enjoy under title, but to create a title under which another may so enter."

In *Douglass vs. Scott*, 5 Ohio, 194, at page 196, the Court said:

"Our own statute extends the English remedy, by bill *quia timet*, and in providing that he who is in possession of land, and having the legal title, may call any pretending a claim to come forward and assert it, has rendered plain the right of the plaintiff to pursue the present remedy."

See also

Norton vs. Beaver, 5 Ohio, 178-179.

In *Rhea vs. Dick*, et al., 34 O. S., 420, at pages 423 and 424, the Court, construing the Ohio statute in its later form, quotes with approval from New Jersey and California cases, which construe similar statutes, as follows:

From *Bogert vs. City of Elizabeth*, 27 N. J. L., 568:

"The act is plainly remedial, and its language is very comprehensive, and, in my judgment, it should be construed to give jurisdiction in every case in which a claim or lien upon real estate appears to be asserted, or to exist. It is highly desirable that lands should be freed from every lurking and unsubstantial claim, for even the suspicion of such claim, no matter how ill-founded, affects the value of property when on sale."

From *Joyce vs. McAvoy*, 31 Cal., 273:

"The statute giving this right of action to the party in possession does not confine the remedy

to the case of an adverse claimant setting up a legal title, or even an equitable title, but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damaged by the assertion of an outstanding title already held or to grow out of the adverse pretension. The plaintiff has the right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or a loss to him of the property."

In *Lowmiller vs. Fouser*, 52 O. S., 123, the Court, quieting plaintiff's title against an unconsummated appropriation of his land for a highway, said, at page 135:

"By this order the road is not to be opened until the payment is made; and no taking can be said to occur until the road is opened to public travel. A mere order establishing a road, with a conditional order for opening it, is not in law a taking of the land until the order for opening it becomes absolute. * * *. It was therefore the duty of the petitioners to comply with the terms of the order and make payment as directed in order to acquire the right to have the road opened for the use of themselves and the public. So that when they neglected to make the payment of One hundred and forty-five Dollars required to be paid January 1, 1891, their right under the order establishing the road terminated, unless the default should be waived by the plaintiff, which was not done. To hold otherwise would

be to establish an unjust and oppressive practice. It would give the petitioners the power at any time to open the road by making payment, whether at the day or not, without any right in the land owner to compel payment. This would materially affect the value of the owner's land, and be a cloud on his title."

This court will take judicial notice of the Ohio statute, and of the construction placed thereon by the Supreme Court of Ohio.

Lamar vs. Micou, 114 U. S., 218.

It being thus settled that in Ohio the statutory action to quiet title extends to the removal of inchoate clouds and allows constructive service upon defendants beyond the jurisdiction of the court in such cases, and it being further settled by *Holland vs. Challen, supra*, that such enlargement of equitable rights may be administered by the Federal Courts, it remains only to consider how Sec. 57 of the Judiciary Act (formerly Sec. 8 of the Act of March 3, 1875), has been applied by the Federal Courts.

In *The Citizens Savings and Trust Company vs. Illinois Central Railroad Company*, 205 U. S., 46, paragraph 2 of the syllabus is:

"A suit brought by owners of stock of a railroad company for the cancellation of deeds and leases under and by authority of which the properties of the company are held and managed is a suit within the meaning of Sec. 8 of the act of March 3, 1875, 18 Stat., 470, as one to remove incumbrances or clouds upon rent (real) or personal property and local to the district and within the jurisdiction of the Circuit Court for the district in which the

property is situated, without regard to the citizenship of defendants so long as diverse to that of the plaintiff, and foreign defendants not found can be brought in by order of the court subject to the condition prescribed by that section, that any adjudication affecting absent non-appearing defendants shall affect only such property within the district as may be the subject of the suit and under the jurisdiction of the court."

See also

Consol. Interstate Callahan Mining Co. vs. Callahan Mining Co. et al., 228 Fed., 528.

The fact that in the case just cited the railroad in question was wholly within the district where the suit was brought, is unimportant, for in *McBee vs. Marietta & N. G. Ry. Co.*, 48 Fed., 243, the same section was applied and enforced as to that part of the railroad property there involved which was located within the Federal judicial district where suit was brought. The same is true of *W. U. Telegraph Co. vs. L. & N. R. R. Co.*, 229 Fed, 234. (See 234 U. S., 369; 201 Fed., 932)

III. The State Court had concurrent jurisdiction with the Federal Court on the bill filed to determine whether the proposed consolidation was in violation of the Clayton Act, and the U. S. Circuit Court of Appeals erred in holding that the State Court had no such jurisdiction.

1. *The action having originally been commenced in the State Court.*

It is the contention of the appellant that the said ruling of the Court of Appeals is erroneous,

first, because while Section 16 of the Clayton Act does not mention the Court where the suit can be brought, it contains the words "in any Court of the United States having jurisdiction over the parties," and it does not make the jurisdiction of the Federal Court exclusive; and, secondly, because the defendants having themselves removed the cause to the Federal Court in which the suit could have originally been brought, the question of the jurisdiction of the State Court over the subject after removal became academic for the cause must proceed as if it had been originally commenced in the Federal Court.

The question of the jurisdiction of a State Court to entertain an original suit in equity to restrain the violation of anti-trust laws of the United States was raised in *Straus vs. American Pub. Assn.*, 231 U. S., 222, but not decided.

Section 24 of the Federal Judicial Code provides that "The District Courts shall have original jurisdiction * * * of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies." But no such subject matter is embraced in the limitation of the section 256 of the same code which provides that "The jurisdiction vested in the courts of the United States in the cases and proceedings therein mentioned, shall be exclusive of the courts of the several states." *Expressio unius est exclusio alterius.* The Judicial Code was not carelessly revised.

There are only *eight classes* of cases in which Congress has made the jurisdiction of the Federal Courts exclusive. They are all enumerated in Section 256 of the Federal Judicial Code of 1910, which is as follows:

"Sec. 256. The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the Courts of the several States:

"First. Of all crimes and offenses cognizable under the authority of the United States.

"Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

"Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

"Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

"Fifth. Of all cases arising under the patent right or copyright of the United States.

"Sixth. Of all matters and proceedings in bankruptcy.

"Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

"Eighth. Of all suits and proceedings against ambassadors, or other public minis-

ters, or their domestics, or domestic servants, or against consuls or vice-consuls."

A glance at each of the above eight classes will show that a suit to restrain an unlawful consolidation because of a violation of the Federal Anti-Trust Laws is not included in any of them.

In *Plaquemines Fruit Company vs. Henderson*, 170 U. S. Rep., 511-520 (supra), this Court expressly approved the rule laid down by Chancellor Kent in his commentaries, as follows:

"The conclusion then is, that in judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the Federal Courts, and that without an express provision to the contrary the State Courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter" (1 Kent's Com., 400).

In *Pettilon et al. vs. Noble*, 19 Fed. Cas., page 390 the precise point made in the case at bar was involved. It was there contended that because the statute permitted suit to be brought in the U. S. Court, the Courts of the State had no jurisdiction, but the contention was overruled. Judge Blodgett said:

"Now, while by the 10th clause of Section 629 of the Revised Statutes of the United States, the Circuit Courts of the U. S. are clothed with jurisdiction, 'of all suits by or

against any banking association established in the district for which such court is held, under any law providing for national banking associations, it will be seen that this Court is not invested with exclusive jurisdiction, its jurisdiction is only concurrent with that of the State Courts."

And in *Cooke vs. State National Bank of Boston*, 52 N. Y., 96, 105, the Court held that the designation in a statute of a particular Court did not affect the concurrent jurisdiction of the State Court. Said the Court:

"I think the proper construction of this section is to regard the power conferred of bringing actions against the associations in specified courts, as permissible, and not mandatory." (Italics ours.)

And in *Robinson vs. National Bank*, 81 N. Y., 385, the Court adhered to the same doctrine.

And after quoting from the *Moore vs. Houston* (5 Wheat.), the Court said:

"And that case also holds that the mere assignment of jurisdiction to a particular Court does not necessarily render it exclusive." * * *

And see to same effect *Whipple vs. Cook*, 55 N. Y., 150.

Concerning the effect of removal from State to Federal Court, Sec. 29 provides, " * * * and the cause shall then proceed in the same manner as if

it had been originally commenced in said District Court."

Bushnell vs. Kennedy, 9 Wall., 387.

And there could be no removal unless the cause was one which could have been originally brought in the Federal Court.

Tenn. vs. Bank, 152 U. S., 454;

Cochran vs. Montgomery Co., 199 U. S., 260;

Ex parte Wisner, 203 U. S., 449.

This cause was cognizable in Federal Court both because Sec. 16 of the Clayton Act expressly authorizes it, and because a right is claimed under a Federal statute. There is also diverse citizenship.

Chalmers Chemical Co. vs. Chadeloid Chemical Co., 175 Fed., 995 (involving the Sherman Law).

So far then as the Judicial Code prescribes or limits the forum for the litigation of matters arising under the Constitution and laws of the United States, it leaves untouched whatever concurrent jurisdiction the State courts might otherwise exercise in regard to restraints or monopolies affecting interstate or foreign commerce. And except when the statute expressly withholds it, such jurisdiction exercised by State courts on other causes of action given or regulated by Federal statutes is upheld by this Court; and so, generally, as to statutory rights with attendant remedies created by the laws of one jurisdiction and enforced by the courts of another.

Claflin vs. Houseman, Assignee, 93 U. S., 130, 136-137;
Galveston, etc., Ry. Co. vs. Wallace, 223 U. S., 481, 489-490;
Tenn. Coal, etc., Co. vs. George, 233 U. S., 354;
Minn. & St. Louis R. R. vs. Bombolis, 241 U. S., 211, 221;
Atchison T. & S. F. Ry. vs. Sowers, 213 U. S., 55, 69.

(Note: The point that the consolidation in question here is in violation of the Clayton Act is argued in Point IV of this brief, at pages 65-72.)

Hamilton-Brown Shoe Co. vs. Wolf Bros., 240 U. S., 251;
Wood vs. Chesborough, 228 U. S., 672.

2. A Stockholder's Suit (if not Brought in the Right of the Corporation) is not Controlled by the Principles Restricting the Right of Private Suit under the Anti-trust Laws.

A stockholder's suit to enjoin the corporation in which he holds shares, from exceeding its powers by transgressing a statute, and from a threatened breach of trust in the illegal misapplication or diversion of its funds in connection therewith, is a subject of settled equity jurisdiction, wholly outside of any remedy prescribed by such statute, and is unlimited thereby.

It is unnecessary to assume that plaintiff is invoking any *remedial* provision of either the Sherman or the Clayton Act, although the latter does expressly authorize the plaintiff's action. Plain-

tiff contends rather that the consolidation is *ultra vires* or illegal, and that as an illegal or *ultra vires* act, however made so, whether by the Sherman Act or by any other law, a minority stockholder has, in his own right, under the general principles of equity jurisprudence, a remedy to restrain the corporation and the majority stockholders from accomplishing or consummating such unlawful consolidation, and from unlawfully misapplying its corporate funds in respect thereto.

The latest decisions of this Court do not foreclose this question, nor limit a stockholder's right of action in such cases to what the Clayton Act by Sec. 16 now expressly permits. *Geddes vs. Anaconda Mining Co.*, 254 U. S., 590, cited *supra*, holds indeed that "The Anti-Trust Act of 1890 provided the exclusive remedies for the rights it created; and it did not enable a private party to set aside a sale because the purchaser bought in pursuance of a purpose to restrain interstate commerce," etc., and also that this rule is now modified only to the extent prescribed by Sec. 16 of the Clayton Act. But that case is one in which minority stockholders sought relief under the Federal Anti-Trust laws and the common law, not simply in their own right as such against the corporation to restrain it from doing an unlawful or *ultra vires* act, as is the case here, but for relief in the right and on behalf of the corporation against a third party to procure the judicial revocation of a completed sale and the restoration of the property to the corporate vendor. For such relief to the corporation decreed against a co-defendant, by a judgment nullifying a consummated transaction, the stockholder plaintiff could naturally have no remedy under the Federal Anti-Trust laws except such as Sec. 16 of the Clayton Act allows.

The case at bar is to be assimilated rather to the suit of a stockholder to prevent illegal diversion of the funds of his own corporation through the voluntary payment of an unlawful tax, despite the provisions of a general statute against the enforcement of taxes. The analogy is this. Here it is claimed that the only suits for injunction maintainable under the Anti-trust acts are those specifically provided for by the acts themselves; whereas, suits to enjoin the enforcement of Federal taxes are altogether prohibited by Revised Statutes Sec. 3224. But a stockholder's suit to enjoin his corporation from the threatened voluntary payment by it of such taxes on the ground of their illegality has nevertheless been held to be maintainable. So here the plaintiff as a stockholder of the Lake Shore *sues* to enjoin his corporation from consummating a threatened breach of trust in the misapplication and diversion of its entire assets through a proposed consolidation which the Sherman and Clayton acts prohibit. As to such a suit it matters not whether these laws exclude the right, by private suit or in a State court, to secure an injunction. The right of a stockholder to enjoin his own corporation from threatened violation of these laws, being an independent subject of equity jurisdiction, is amenable to no such limitation. *Brushaber vs. Union Pacific R. R.*, 240 U. S., 1, 10; *Stanton vs. Baltic Mining Co.*, 240 U. S., 103.

The point, however, is made perfectly clear by another tax injunction case in the same volume which was not a stockholder's case, and in which Revised Statutes Sec. 3224 was held fatal to the maintenance of the suit. *Dodge vs. Osborn*, 240 U. S., 118 (quoting from *Snyder vs. Marks*, 109 U. S., 189, 193-194).

Precisely the same distinction as that now contended for was upheld in *De Koven vs. Lake Shore and Michigan Southern R. R. Co.*, 216 Fed., 955, involving this same consolidation, wherein De Koven was represented by Hon. George W. Wickesham, former Attorney General of the United States, and the respondents were represented by some of the same counsel who appear in this court.

In the case at bar, the Circuit Court of Appeals, in its opinion on the second appeal, entirely ignored (Rec., 142-144) the two instructive and contrasting cases cited *supra* from 240 U. S. Reports, although these authorities were urged upon the court's attention in argument and brief. In fact, that court's second decision is wholly inconsistent with its first one, and completely ignores its own established "law of the case." The distinction recognised and preserved by the strictly analogous and contrasting *Brushaber* and *Dodge* cases *supra*, and expressly defined and applied by Judge Grubb in the *De Koven* case *supra*, was finally disallowed by the Court of Appeals as follows (Rec., 142, 143):

"The decision in *Paine Lumber Co. vs. Neal*, 244 U. S., 459, is clearly decisive and justifies the dismissal of this branch of the bill, unless the case may be distinguished from that, because this suit is by a stockholder and that was by a treasurer * * *. We are unable to see any distinction in principle in this respect between a stockholder's case and the Paine case. A stranger who was about to suffer irreparable loss from unlawful acts of another, had the right to proceed in equity for

an injunction against that stranger, just as much as a stockholder did against his corporation. The jurisdiction of equity does not depend on the anti-trust act in the suit by the stranger, any more than it does in the suit by a stockholder * * *."

The last sentence is a clear fallacy. Congress may within its proper sphere characterize certain conduct as wrongful and define the exclusive remedy. But in a trust relation like that between a stockholder and his corporation, the jurisdiction of equity has ever found its peculiar and favorite office, its most ancient and fundamental function, in preventing any threatened abuse of confidence justly reposed. Equity is not deterred from preventing at the suit of a *cestui que trust*, any threatened wrong-doing of a trustee in regard to his trust, by the mere fact that only the state may directly invoke the penalty or remedy prescribed by the statute which defines the wrong. One ground of distinction between a stranger's suit for injunction and a stockholder's is that the former must allege a threatened injury, *of which he is entitled in a court of equity and in the particular forum to complain, and which will entail irreparable damage*. But equity will always entertain the suit of a stockholder against his own corporation, charging it with threatened *ultra vires* conduct, because from the very first the chancellor has unhesitatingly and without conditions controlled the conduct of a trustee, on the mere allegation of any threatened breach of trust.

For this very reason the profitableness or unprofitableness of a transaction by a corporation

which is *ultra vires*, does not affect the right of a stockholder to enjoin it.

Byrne vs. Schuyler Elec. Mfg. Co., 65 Conn., 336; 28 L. R. A., 304; cited in 10 Cyc., 968, note 6;

Victor vs. Louise Cotton Mills, 61 S. E., 648; 16 L. R. A. (N. S.), 1020, and cases there collected.

In *Zabriskie vs. Clev., Col. & Cinn. R. R. et al.*, 64 U. S., 381, the court said at page 395, "The frame of the bill implies that this contract exceeds the power of the corporation, and cannot be confirmed against a dissenting stockholder. *His authority to file such a bill is supported upon this ground alone.*

Dodge vs. Woolsey, 18 How., 331;
Mott vs. Penn. R. R. Co., 30 Penn., 1;
Manderson vs. Commercial Bank, 28 Penn., 379." (Italics ours.)

It is not necessary for the shareholder suing as such in his own right to show special injury to himself.

22 Cyc., 875, and cases cited in note 11;
Botts vs. Turnpike Co., (Ky.), 2 L. R. A. 594 at page 596, column 2.

Any *ultra vires* act or course of conduct on the part of the corporation which, being in violation of positive law, alters the relation of the stockholder without his consent to the corporate enterprise in which he has invested his funds, amounts to a diversion of the funds thus entrusted

to the corporation and to a breach of the trust reposed in it by the stockholders. Such a breach of trust is cognizable in equity under the settled practice of the courts of chancery in England, and frequently approved by this court. To remedy a breach of trust or prevent the same by injunction at the suit of any beneficiary of such trust, has never been held to require the showing of any special damage to the complainant. *He is entitled as of absolute right to enforce strict observance by the trustee of his positive duties as such.* In like manner, a stockholder's rights and the correlative duties of the corporation to the stockholder as prescribed by the law of its creation or incorporation, are enforceable in equity at the suit of such stockholder, upon the mere allegation and proof that a diversion of the corporation funds or a breach of trust by the corporation is threatened; and unless invited or condoned, such breach of trust is conclusively deemed to be an irreparable injury to the stockholder.

2 High on Injunctions, §1224;

3 Pom. Eq. Jur., 3d ed., Sec. 1093, page 2117; Sec. 1088, page 2110; Vol. 4, Sec. 1339, page 2667 and 2668; Sec. 1345, page 2676; Vol. 5, Sec. 303, page 541; *Pollock v. Farmers Loan & Trust Co.*, 157 U. S., 429; 3 Cook on Corporations, 7th ed., Sec. 669, page 2162;

1 Spelling's Injunctions and Other Extraordinary Remedies, 2nd ed., Sec. 752, page 630-631; 10 Cyc., 299, 984, 985.

In the stockholder's suit to prevent by injunction the carrying out of a plan which involves the

complete subversion of the relationship between the defendant corporation and its stockholders, by a merger which is prohibited as unlawful by the statutes and constitutions of various States, by the principles of the common law, and finally by the Anti-trust acts of the United States, it is quite immaterial what remedies are prescribed by the laws, statutes or constitutions which are thus transgressed, so long as it appears that the proposed change of the stockholder's status as a result of the threatened action by the corporation is an unlawful one. This action is therefore not to be regarded solely as one authorized by the laws alleged to be violated (though it is expressly authorized by Sec. 16 of the Clayton Act), but as being also an action to restrain the diversion of funds and the breach of trust involved in a radical change and dissolution of the relationship between the corporation and its stockholders, such change being prohibited and made unlawful by the laws in question. The remedy afforded by statute, and that which exists as an independent exercise of equity jurisdiction, are clearly distinguishable and they co-exist. Judge Noyes in his *Intercorporate Relations*, 2nd Ed., Sec. 40, page 77, says:

"The consolidation of competing or parallel railroad companies in the face of a constitutional or statutory prohibition is unlawful, and, therefore, *ultra vires*, and may be restrained at the suit of any stockholder. * * * The state may also enjoin such a consolidation and have the proceedings declared void, upon the ground that they are unlawful and contrary to the declared policy of the State."

See also

Ibid., Sec. 46, page 77; Sec. 48, page 80.

In 4 *Pom. Eq. Jur.*, Sec. 1339, page 2668, cited *supra*, it is said of a trust enforceable by injunction that "if its existence is shown, a court of equity not only has the jurisdiction but is bound to grant every kind of remedy necessary to its complete establishment, protection and enforcement according to its essential nature. Many breaches of trust are of such a nature that if accomplished they would completely defeat the right of the beneficiary to the specific trust property."

In *Jemison vs. C. S. Bank*, 122 N. Y., 135, the Court of Appeals of New York defined the term "*ultra vires*" as follows:

"An act may be *malum in se* or *malum prohibitum*, or an act may not be immoral or prohibited by any statute, and still it may be in excess of the powers vested in the officers of a corporation, unauthorized and prejudicial to the stockholders. In either case the plea of *ultra vires* should prevail unless it would defeat justice or accomplish illegal wrong" (page 141).

Where an *ultra vires* act is also *malum prohibitum*, the private right of a stockholder and the public right exercised or authorized by the state, are distinguishable, parallel and consistent.

Central R. R. Co. vs. Collins, 40 Ga., 628, 629.

Harding vs. American Glucose Co., 182 Ill., 551, 625.

3. The Plaintiff's Right in General to Maintain this Stockholder's Suit.

(a) *Threatened Damage*.—It is of course true that in suits under Sec. 16 of the Clayton Act, the express provisions of that act in regard to showing loss or damage must necessarily be complied with, but, as already frequently pointed out, this is not a suit which invokes only the remedy afforded by the Anti-trust acts. In its other aspect heretofore discussed, a stockholder's suit to enjoin a breach of trust need not show any other damage than such as is implied in the legal injury arising from the misconduct of the trustee. It is true indeed that where a stockholder seeks to enjoin his own corporation from the proposed or threatened violation of any statute which does not involve an unlawful diversion of the trust funds or a transformation of the relationship existing between the corporation and its stockholders, but only the incurring by the corporate officials concerned of the penalties or liabilities annexed by law to such violation, a stockholder, in order to maintain such suit for injunction, must allege and show that the threatened injury to himself alone or to himself and his fellow stockholders, by reason of such misconduct by or on behalf of the corporation, differs from that which will be suffered by the general public. Compare *Sparhawk vs. Union Pass. R. Co.*, 54 Pa. St., 401, where a stockholder was refused injunction against the running of trains by the company on Sunday, and *Colman vs. Eastern R. Co.*, 10 Beav., 1, where a single stockholder was granted injunction against the *ultra vires* running of steamers by the company—though he bought his shares, because of interest in a rival company, for

the purpose of suing. So, too, no relief is available without a showing of special damage, where the corporate conduct complained of is a lawful and authorized though radical departure from the original scope of the corporate enterprise, as in *Continental Securities Co. vs. Interborough R. T. Co.*, 221 Fed., 44, where the departure not being illegal, and there being no special damage, injunction was denied. These distinctions afford the key to the few instances in which the element of damage in such stockholders' cases has been held to be an essential ingredient of the right of action.

But if "threatened loss or damage" to plaintiff were essential to be shown, it is abundantly disclosed under the general and specific allegations to that effect in the bill here.

The threatened loss to the stockholders as pleaded in the complaint, is at least twenty million dollars (Rec., 18). This allegation is, of course admitted by the motion to dismiss. The entire assets of the L. S. & M. S. Ry. Co. were to be unlawfully transferred by the proposed illegal consolidation into the possession and ownership of the new company. Besides this fundamental and sweeping change in stockholders' relations, it is alleged that the merger, being in transgression of anti-trust acts and other laws, will also entail forfeitures and penalties, to plaintiff's irreparable injury.

Bigelow vs. Calumet & Hecla Mining Co.,
155 Fed., 869, 880; 10 Cyc., 983.

Furthermore, the Federal courts take judicial notice of the State laws—the Circuit Court of Appeals held, erroneously therefore, that these were too indefinitely pleaded to afford ground

alone on which to maintain the suit—which laws impose heavy incorporation fees for the organization of the consolidated corporation which the bill sought to enjoin. In these particulars plaintiff is of course specially damaged, and his damage is different from that of the general public.

Plaintiff further suffers from the fact that his company, the Lake Shore, is manipulated by the New York Central.

Milbank vs. N. Y., L. E. & W. R. R. Co.,
64 How. (N. Y.), 29;
Stewart vs. Erie & Western Transportation Co. et al., 17 Minn., 372, 375, 389;
Dunbar vs. American Tel. & Tel. Co.; 238 Ill., 456, 484;
Harding vs. American Glucose Co., 182 Ill., 551, 625.

As the charter of the corporation which enters into a trust combination, the object of which is to destroy or restrain competition or to create a monopoly, is subject to forfeiture, and the corporation may be heavily penalized, there can be no question that both the corporation and the individual stockholder were threatened by a loss or damage resulting from such illegal combination.

Green's Brice on Ultra Vires, 643;
Board of Commissioners vs. Lafayette M. & B. R. R. Co., 50 Ind., 85; 29 Amer. & Eng. Enc. of Law, 84;
Clarke vs. Central R. R. & Bkg. Co., 50 Fed., 338;
Steele vs. United Fruit Co., 190 Fed., 631.

Furthermore, plaintiff is required to exchange his stock held in the old companies for other stock

issued by the new company which is tainted with illegality, and can be dissolved at the instance of either a State or the United States or at the suit of another stockholder. Plaintiff's case therefore falls within Sec. 16 of the Clayton Act, granting injunctive relief against threatened loss or damage.

Pearsall vs. Great Northern Ry. Co., 161 U. S., 646, 671;

Clearwater vs. Meredith, 1 Wall., 25;

Pearce vs. Madison, etc., R. R. Co., 21 How., 441;

Zabriskie vs. Clev., Col. & Cinn. R. R., 23 How., 381, 395.

(b) *The Alleged Prescriptive or Vested Right of Defendants*—On the alleged absence of any retrospective application of the Federal Anti-trust laws it seems to be claimed that the old New York Central by holding the stock of the Lake Shore and also the Michigan Central [two parallel and competing railroads] acquired a "vested right" which carried with it the right to consolidate. This is not the law. In *Pearsall vs. Great Northern Ry. Co.*, 161 U. S., 646, cited *supra*, the court says at page 675:

"But we think it was competent for the legislature, out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we cannot recognize a vested right to do a manifest wrong."

See also,

L. & N. R. R. Co. vs. Kentucky, 161 U. S., 677;

United States vs. Trans-Missouri Freight Ass'n, 166 U. S., 342.

The following other cases decided by this court hold that a conspiracy to violate the Sherman Act is a continuous offense, and that the statute of limitations does not apply.

United States vs. Kissel, 218 U. S., 601;
54 L. Ed., 1168;

Hyde vs. United States, 225 U. S., 347;
56 L. Ed., 347;

United States vs. Patten, 226 U. S., 525.

The rule is universal that stockholders may enjoin the company in which they own stock from continuing to do acts prohibited by law. Such an action may always be maintained by a stockholder, for he is always interested to see that the property of the company is not used contrary to law, especially if the act complained of is punishable by a forfeiture of the company's charter or by onerous penalties, the exaction of which would damage the company.

Shawnee Compress Co. vs. Anderson, 209 U. S., 423;

Pearshall vs. Gt. Northern Ry., 161 U. S., 646;

Bigelow vs. Calumet & H. M. Co., 155 Fed., 869;

Steele vs. United Fruit Co., 190 Fed., 631;

Dunbar vs. Am. Tel. & Tel. Co., 224 Ill., 1; 238 Ill., 456;

Harding vs. American Glucose Co., 182 Ill., 551;

Schicab vs. Potter Co., 194 N. Y., 409;
Pollitz vs. Wabash Ry. Co., 207 N. Y., 113;
Manderson vs. Commercial Bank of Pa.,
 28 Pa. St., 379;
George et al. vs. Central R. R. & Bkg. Co.,
 101 Ala., 607;
State ex rel. Jackson vs. Newman, 51
La. Ann., 833;
State vs. Port Royal Ry., 45 S. C., 470;
Thomas vs. R. R. Co., 101 U. S., 71, 86, 87;
Central Transportation Co. vs. P. P. &
Co., 139 U. S., 24, 49.

Of course, in the case at bar, not only was there no acquiescence, but plaintiff seasonably protested, voted against the consolidation and brought suit even before the stockholders voted upon the proposition.

See also, *Mobile, etc. R. R. Co. vs. Mississippi*, 210 U. S., 187, wherein the court said:

"Whether corporations shall remain separate or be permitted to consolidate is a matter of State regulation and provision. It is competent also for a State to prescribe the route of the railroad it creates, and to provide that parallel and competing lines shall remain so."

(c) *Plaintiff's Alleged Remedy under the Ohio Statute*—In its first opinion the Circuit Court of Appeals correctly said (Rec., 124):

"It is further urged that the motion to dismiss should have been granted, for adequacy of remedy at law, by reason of the fact that Sec. 9084 of the Ohio General Code provides that a stockholder who refuses to convert his

stock into that of a consolidated company shall be paid the highest market value thereof during the two years preceding the making of the agreement for the consolidation by the directors, if he had previously so required. This statute, whose prime purpose was evidently to provide just compensation to a stockholder dissenting from a consolidation lawfully made, does not, in our opinion, provide an adequate remedy for a stockholder who seeks in advance to restrain the corporation from entering into an illegal consolidation."

(d) *The Alleged Lack of an Indispensable Party* (The N. Y. C. & H. R. R. Co.)—The Circuit Court of Appeals' first opinion contained the following correct recital and conclusion on this point (Rec., 121-122) :

"The motion of the Lake Shore Company to dismiss, which was directed to the entire petition, was based primarily upon the ground that the New York Central Company was an indispensable party, materially interested in the relief prayed, whose rights were so involved that a determination of the cause without its appearance would be inconsistent with equity; also, in general terms, upon want of equity on the face of the petition, and adequacy of remedy at law. * * *

"The New York Central Company was not, however, an indispensable party to so much of the petition as sought to enjoin the Lake Shore Company itself from entering into the proposed consolidation; which was alleged to be illegal under various provisions of law, entirely independent of the ownership and vot-

ing of the controlling stock held by the New York Central Company. In a suit by a stockholder to enjoin a corporation in which he holds stock from entering into an illegal merger with another corporation, such other corporation need not be made a party; its interest being entirely remote. *Blatchford vs. Ross*, 54 Barb. (N. Y.), 42, 47. When the original petition was filed the consolidation agreement had not been made effective by vote of the stockholders of the Lake Shore Company as required by Sec. 9028 of the General Code of Ohio. Therefore the New York Central Company had acquired no vested contract right in the proposed consolidation; and its mere expectancy that the Lake Shore Company would enter into such agreement was a wholly prospective interest, of a remote and non-justiciable character, which did not entitle it to be heard, in the capacity of a contracting party, in litigation seeking to enjoin the Lake Shore Company from entering on its own account, into such consolidation, or render it an indispensable party thereto. Nor was it indispensable to such litigation in its capacity as a stockholder in the Lake Shore Company; that company itself under the well settled general rule, representing its individual stockholders in the defense of suits involving its corporate rights and functions. *Taylor vs. Southern Pacific Co.* (C. C.), 122 Fed., at page 153. And see *Blatchford vs. Ross*, 54 Barb. (N. Y.) *supra*, at page 48."

At the time this suit was commenced this railroad company (N. Y. C. & H. R. R. Co.) had as yet no other right with respect to the

proposed consolidation than that of a majority stockholder in the Lake Shore Company. The fact that it was proposing to consolidate its own railroad with that of the Lake Shore gave rise to no vested right to have such consolidation consummated. The relation of this plaintiff to the Lake Shore Company and the theory on which its petition was drafted, have already been discussed. It has never been deemed necessary for a minority stockholder, in suing to enjoin his own corporation from an *ultra vires* act, to join as a defendant the owner or owners of the majority of the stock even though such owner or owners expect to profit by the action not yet consummated but threatened and hence sought to be enjoined. It is said, however, that the right of the majority stockholder (N. Y. C. & H. R. R. Co.) in the Lake Shore Company to vote for the consolidation under Ohio General Code, Sec. 9028 was a general right involving no corporate action by the Lake Shore Company itself. The mere statement of this proposition should be its own refutation, but the section itself provides:

"If two-thirds of all the votes cast are for the adoption of the agreement, that fact shall be certified thereon by the secretary of each of the companies, and the agreement so adopted, or a certified copy thereof, shall be filed in the office of the Secretary of State."

The next succeeding section provides that when the agreement is so made, perfected and filed, the consolidation shall become effective. These are clearly corporate acts to be performed by the Lake Shore before any property rights with respect to the consolidation could accrue; and when the question whether such corporate acts could lawfully

be performed or should be enjoined, is put in issue by a minority stockholder as between himself and the corporation, all the essential parties to such controversy are then before the Court, and the threatened corporate action, if *ultra vires*, may be enjoined.

The case of *Minnesota vs. Northern Securities Co.*, 184 U. S., 199, is inapplicable, for there the relief sought was the undoing of an illegal combination already accomplished, the Northern Securities Company which was the only defendant in court, being the instrument or holding company; whereas here the N. Y. C. & H. R. R. Co.'s interest had not yet been merged in the illegal combination and as a stockholder of the Lake Shore Company it was sufficiently represented in court by reason of the latter's presence there. *Pearsall vs. Ry.*, 161 U. S., 646.

No transfer of title pending the action can make one an indispensable party who was not such at the time the action was commenced. *Union Trust Co. vs. Southern Inland Navigation & Improvement Co.*, 130 U. S., 565.

Taylor vs. Southern Pac. Co., 122 Fed., 147, is irrelevant; for there the relief sought was an injunction against the election of directors by the vote of the dominant stockholder—an absolute right and in itself innocent, involving no *ultra vires* corporate action. Here, however, the Lake Shore's corporate act was requisite to consummate the unlawful consolidation; and to enjoin that act is clearly distinguishable from forbidding a stockholder to vote his shares therefor. As between the two, the latter is the indirect method; the former direct. In order to enjoin the foreign holder of the majority stock from voting it, such foreign stockholder of course is an indispensable party;

but to enjoin *ultra vires* corporate action by the company, a majority of whose capital stock is threatened to be voted therefor, no more requires making a single majority stockholder a party than it would require making parties of all of a majority group comprising many small stockholders. The real matter of concern contemplated by the original petition herein was and is the Lake Shore's action rather than that of its stockholders merely. At the suit of a minority stockholder the corporation may be kept from *ultra vires* acts, though its majority stockholder would have it exceed its powers and violate the laws.

(e) *Plaintiff's Status, Interest, etc., and Equity Rule 27*—It is the absolute and indefeasible right of the holder of even a single share of stock to interpose for the prevention or undoing of an *ultra vires* or illegal act by the corporation of which he is a stockholder. *Hoole vs. Great Western Railway*, L. R., 3 Ch. App., 262; 3 Cook on Corporations, 7th ed., page 2162, Sec. 669.

A purchaser of stock whose object in so doing is to bring a stockholder's suit to enjoin an *ultra vires* act which will injure another enterprise of the plaintiff may obtain an injunction. *Carson vs. Iowa City, etc., Company*, 80 Iowa 638; *Colman vs. Eastern R. Co.*, 10 Beav., 1.

In *Dickerman vs. Northern Trust Company*, 176 U. S., 181, it is said in the opinion at page 192:

"So, too, it has been held that a person may purchase stock in a corporation for the very purpose of bringing a stockholder's suit, and that the law will not inquire into the motive which actuated his purchase. (*Bloram vs. Met. Railway*, L. R., 3 Ch. App., 337; *Seaton vs. Grant*, L. R., 2 Ch. App., 459; *Elkins vs. Camden & Atlantic Railroad*, 36 N. J. Eq., 5.)"

In *Kerr on Injunctions*, page 558, it is said:

"Any single registered shareholder has a right to bring an action either in his own name, or on behalf of himself and all other shareholders who have a common interest with himself, to restrain the application of the common funds of the company to another purpose than the proper purposes of the concern, and the court will interpose on his behalf by injunction. The amount of interest of the complaining stockholder will not be taken into consideration. Nor will his motives for complaining be inquired into. A shareholder may maintain the action, although holding shares in a rival company. The fact that the action may not have been instituted from the best of motives is not sufficient to debar him from suing."

See also 3 Cook on Corporations, 7th ed., pages 2680-2684. Nor, indeed, could any such issue be raised. *Ramsey vs. Gould*, 57 Barb. (N. Y.), 398; *Elkins vs. R. R. Co.*, 36 N. J. Eq., 5, 14; *Central R. R. Co. vs. Collins*, 40 Ga., 582; *Pollitz vs. Wabash R. R. Co.*, 150 App. Div. (N. Y.), 709 (reviewing authorities at page 181).

Here, plaintiff's interest, direct and indirect, in the capital stock of the Lake Shore Company is very substantial. The N. Y. C. & H. R. R. Co. owned more than nine-tenths of that capital stock. Plaintiff, as the owner of 300 shares of New York Central stock before ever the directors voted or agreed to consolidate, was thus the possessor of a large equitable interest in the Lake Shore's capital stock. After the illegal consolidation was voted by the directors of both companies, but before the requisite ratification by the stockholders of either, plaintiff became the owner of five shares of Lake

Shore stock, thus reinforcing and fortifying the large equitable interest previously owned by it. Under oath in its petition, the complainant alleged (Rec. 3, 18 and 19) :

"Defendant, The Lake Shore Company, has an authorized capital stock of \$50,000,000, consisting of 500,000 shares of the par value of \$100 each, all of which is outstanding except that 39 shares thereof are held in the treasury of said company. * * * Of said stock so outstanding, 452,892 shares are, and, ever since 1898 have been, owned by The New York Central and Hudson River Railroad Company, defendant herein, and said New York Central Company thereby has dominated and controlled, and is now dominating and controlling the affairs, management and policy of the Lake Shore Company. * * *

"Plaintiff is and has been since June 27, 1914, the owner of five shares of the capital stock of the Lake Shore Company, and the same is and has been since said date registered in its name upon the books of said corporation; it brings this suit on behalf of itself and all other similarly situated stockholders of the Lake Shore Company who may join herein. In like manner, plaintiff is the owner of three hundred shares of the capital stock of the New York Central Company, and the same is registered in plaintiff's name upon the books of said company.

"Plaintiff has been the owner and registered holder of said stock since February 24, 1914. Plaintiff has attended the meeting of stockholders of the New York Central Company called for the consideration of said consolida

tion agreement before referred to and voted and protested against the same. * * *

"By reason of plaintiff's ownership of stock of the New York Central Company as above set forth, it is equitably interested in the stock of the Lake Shore Company so owned by the New York Central Company in addition to the direct interest in the stock of the Lake Shore Company represented by its ownership of said five shares aforesaid."

The Court of Appeals in its first decision, conceded, as to plaintiff's stock holdings, that (Rec. 123) "The amount of such stock, namely, five shares, was not so inconsiderable and trifling in value that the plaintiff should, on that ground, be denied such equitable relief as it might otherwise be entitled as a matter of right to receive," and acknowledged also "the right of a single stockholder to interpose for the prevention of an *ultra vires* and illegal act by the corporation in which he is a stockholder."

A stockholder is in ample time to file his suit if he was a stockholder before the meeting of stockholders at which final action was taken. *Forrester vs. B. & M., etc., Mining Co.*, 21 Mont., 544, 550 (construing the equity rule that the complainant must be a stockholder before the wrong was committed); *Venner vs. Pa. Steel Co. of N. J.*, 233 Fed., 407; note in 38 L. R. A., N. S., 988; note in L. R. A., 1917, A764.

Equity Rule 94, now Rule 27, applies only to such stockholders' cases as are founded solely on rights which may properly be asserted by the corporation. This was so held by the Circuit Court of Appeals in the case at bar, and the same is clearly apparent from the plain language of the rule it-

self. Moreover, the purpose of the rule is to secure the Federal courts from imposition on their jurisdiction. *Delaware & Hudson, etc., Co. vs. Albany & S. R. R. Co.*, 213 U. S., 435. As this case is one removed by the defendants, it cannot be said that the plaintiff has attempted to impose upon the jurisdiction of the court.

IV. Appellant's case under the Clayton Act.

Section 16 of the said Act provides:

"Sec. 16. Injunctive Relief by Private Parties."

"That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any Court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including Sections Two, Three, Seven and Eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage, is granted by courts of equity, under the rules governing such proceedings and upon the execution of proper bond against damages for an injunction improvidently granted, and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, that nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provision of the Act to regulate

commerce, approved February 4, 1887, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." (Note: The Act of February 4, 1887, relates to rates and has no application to a stockholder's suit to enjoin an *ultra vires* contract by his railroad corporation.)

And as to the right of a stockholder to sue under the Clayton Act, see

Geddes vs. Anaconda Mining Co., 254 U. S., 590.

In the *Geddes* case, *supra*, the right of a stockholder to bring his action under the Clayton Act was recognized, but on a review of the facts it was held that the transaction complained of did not tend to create a monopoly.

It is not true that Judge Thomas in the case in 177 App. Div. (N. Y.), 296—which is cited in the second opinion of the Circuit Court of Appeals (Rec., 144, note)—came to the independent conclusion that no private suit for injunctive relief under the Clayton Act is maintainable if begun in a State court. His concluding words on that subject are, "It is the duty of this Court to abide by the decision noted, although an opposite conclusion would harmonize with earlier consideration of the jurisdiction of State courts under other statutes." The only "decisions noted," in so far as they involve the Clayton Act, are two decisions by lower courts of the State of New York—precedents by courtesy. The inconclusiveness of that case is illustrated by the similar conjunction of adjudications exhibited in the very recent case of *Southern Pacific Co. vs. Bogert*, 250 U. S., 483, at pages 489 and note, and 491. Twenty years of fruit-

less litigation, involving the failure of many cases, was finally crowned with success in the last of a series of suits brought to vindicate the rights of minority shareholders that were ignored in an inter-corporate transaction.

In the New York suit the discretionary writ of certiorari was refused by this Court evidently because, irrespective of the merits of the Federal—as well as other substantive—questions involved, the dismissal of the complaint by the courts of that State partly on questions of their own practice and of general law, was of itself enough to preclude reversal here. It is not significant.

The action in the case at bar was instituted on December 8, 1914, *prior to the holding of the stockholder's meeting of the Lake Shore & Michigan Southern Railway Co.*, called for December 22, 1914, to vote upon the consolidation agreement and for the purpose, among other things, of enjoining the carrying out of said agreement, the voting by the New York Central & Hudson River R. R. Co., of its controlling stock interest in said Lake Shore Co., in favor of such consolidation, and to prevent the merger and control in the proposed new company of the Michigan Central, Nickel Plate, Big Four and other parallel and normally completing lines of railroad and of the Western Transit Co., owning a competitive line of steamships operating upon the Great Lakes, and for general relief.

The Clayton Act was then in full force and effect, it having gone into effect on October 15, 1914. Section 16 specifically mentions Section 7 of the act prohibiting the acquisition of the kind of stocks in question here.

The effect of the consolidation as stated in the complaint and admitted by the motion to dismiss will be to vest in the new consolidated company not

only one line from New York to Chicago consisting of the old Lake Shore and old New York Central with duplicate, and in some instances triplicate lines between certain other interstate and intrastate points, but also the controlling majority stock interest in three other companies owning and controlling parallel and competing railway lines west of Buffalo, running in the same general direction, to wit: The Michigan Central, Nickel Plate and the Big Four, all of which three companies either directly own their own lines, or indirectly by connection with or running arrangements over other lines reach many common points both intrastate and interstate; and there will also be vested in the new company, the entire stock ownership of the competitive steamship line upon the Great Lakes between Buffalo, Detroit and Chicago and intermediate points and the new company through lease and stock ownership will also control the West Shore R. R. owning a line of road from Buffalo to New York closely parallel to and which should compete with the New York Central over the whole distance for both intrastate and interstate business.

Section 7 of the Clayton Act (Oct. 15, 1914) provides:

"Sec. 7. (*Acquiring Stock in Another Corporation.*) That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation, engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in

any section or community, or tend to create a monopoly of any line of commerce."

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially *lessen competition between such corporations*, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." * * *

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired; provided, that nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the anti-trust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided."

That the *direct result and effect* of acquiring stock by one railroad in another railroad owning a parallel or competing line is a *lessening of competition*, we refer to the case of *Pearsall vs. Great Northern Railway Co.*, 161 U. S., 646.

In that connection Mr. Justice Brown at page 676 said:

"Whether the consolidation of competing lines will necessarily result in an increase of rates or whether such consolidation has generally resulted in detriment to the public, is be-

side the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect, in short, puts the public at the mercy of the corporation." * * *

And in the *Union Pacific Case* (226 U. S., page 88), where Mr. Justice Day said:

"The consolidation of two great competing systems of railroads engaged in interest commerce by a transfer to one of the dominating stock interest in the other, creates a combination which restrains interstate commerce within the meaning of the statute, because in destroying or greatly abridging free operation of competition theretofore existing, it tends to higher rates." * * *

And continuing he said:

"Competition between two such systems consists not only in making rates * * * but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight and the prompt recognition and adjustment of shippers' claims. The inducement to maintain these points of advantage—low rates, superiority of service and accommodation—did not remain the same in the hands of a single dominating and common ownership as it was when they were the subjects of active promotion by competing owners whose success depended on their accomplishment." * * *

The "dominating stock interest" above referred to consisted of 48 per cent. of the stock of the holding concern—South Pac. Co. of Ky.—which

owned all the stock of Southern Pacific Railroad Co.

Under these decisions it is difficult to conceive how it could be argued that the acquisition of the stocks in question by the present New York Central Company (representing more than a majority interest in the capital stock of the several companies mentioned) after the passage of the Clayton Act, can be regarded as lawful.

By the consolidation the new consolidated company became vested with all of the stocks in and carrying control of the competing railroad and steamship companies, held by the consolidating companies which acquisition was made by the new company after the Clayton Act went into effect. This acquisition is clearly prohibited by Section 7 of the said act.

In view of the express language of the statute granting a private party the right to enjoin a threatened violation of Section 7 of the Clayton Act, or a violation of the anti-trust acts of the United States there remains only this question:

Whether the scheme of consolidation as outlined in the bill of complaint under the conditions existing at the time the suit was brought, comes within the terms of the statute, to wit, "against *threatened loss or damage* by violation of the Anti-Trust laws, including Sections 2, 3, 7 and 8 of this Act."

That plaintiff (appellant here), would be specially damaged and different from the general public is pleaded in the petition where it is charged that the damage of the company by reason of the purchase of the various securities described herein and forming part of the plan of consolidation would be twenty million dollars (Rec., 18).

Plaintiff is also damaged by the fact that he would be obliged to surrender *good securities* in *lawful* corporations, and take in exchange the shares of stock of *an illegal company which may be dissolved at any time*, and, as was stated in the case of *Harding vs. American Glucose Co.*, 182 Ill., 551, *such stock would be entirely worthless*, as the charter of the company would be subject to forfeiture. (And see argument on "Threatened Damage," pages 51-56, of this brief.)

V. Appellant's case under the Sherman Act.

The Clayton Act (Oct. 15, 1914), by reference incorporates the Sherman Act, so that both acts became one. If plaintiff has the right to sue under the Clayton Act, he likewise has the right to sue under the Sherman Act.

The cases holding that a private party may not sue for a violation of the Sherman Act were all commenced for acts done prior to the passage of the Clayton Act.

The paramount question in this case is whether the consolidation contemplated at the time of the commencement of this action, and which was consummated *pendente lite*, comprising *through stock ownership* *many parallel and competing lines* engaged in *interstate commerce*, violated the provisions of Section 7 of the Clayton Act and also of the Sherman Anti-Trust Act. There seems to be very little room for doubt that the consolidation in question here is illegal under the decisions of this Court in

Northern Securities Case, 193 U. S., 197.
United States vs. Union Pacific, 226 U. S.,
61.

In both of these cases, which involved the consolidation *through stock ownership* of parallel and

competing lines, this Court held the consolidations to be illegal. This Court also held that under the Commerce clause of the Constitution of the United States the anti-trust laws of the United States are paramount to the laws of the state and are controlling; that a consolidation of parallel and competing lines engaged in interstate commerce will be declared illegal even though the laws of the State under which the railroads were organized permitted such a consolidation. The case at bar therefore involves the construction and application of the anti-trust laws of the United States.

The Union Pacific Case (226 U. S., 61).

In this case, this Court held that the ownership by the Union Pacific of about 48 per cent. of the stock of the Southern Pacific Company, a Kentucky holding corporation, owning substantially all of the stock of the Southern Pacific R. R. constituted a violation of the Sherman Law and required the Union Pacific to divest itself of the Southern Pacific Company's stock.

In a general way, the Union Pacific runs from Council Bluffs, Iowa, and Kansas City, Mo., to Ogden, Utah and Portland, Ore. The Southern Pacific runs from New Orleans to Portland, Ore., via San Francisco, and from San Francisco to Ogden. The two systems thus have only one terminus in common—Portland, Ore.—instead of both having termini in common, as is true of the roads involved in the case at bar.

Ogden is the eastern terminus of the Central Pacific (owned by the Southern Pacific), and with the Union Pacific forms a continuous line from the Missouri River to San Francisco.

It further appeared that each of the roads did a great deal of business for which they did not com

pete, and that the competitive interstate traffic carried by the two companies constituted a very small proportion of their total business. Nevertheless, since competition in a portion of the traffic was restrained by the combination, the Court reached the conclusion that the control through stock ownership was in violation of law.

As a result of this decision, it is respectfully submitted that it is now the law, that a combination between two or more common carriers, which are potential competitors, for a part of their traffic, is in violation of the Sherman Act, even though each constituent member of the combination does other business which is not competitive.

So, if in the case at bar, it should be suggested that each constituent of the New York Central system carries traffic between certain intermediate points, which is not competitive, the reply to such argument would be that all roads are potential competitors for through traffic between Buffalo and Chicago, as well as for traffic to certain common intermediate points, and the fact that this competition is eliminated is sufficient to stamp the combination as illegal.

The Union Pacific decision further stands for the proposition that every restraint of competition involves a restraint of trade.

This case also holds that it is immaterial what form the combination takes, and that whether the stock of the competing road is held through a holding company or by another railroad company is entirely inconsequential.

See also:

United States vs. Reading Co., 253 U. S.,
26.

VI. Independently of the anti-trust laws of the United States and of the general principles of jurisprudence, the petition stated a good cause against the defendants for the violation of the constitutional and statutory provisions of the several states pleaded in the petition and the Court erred in dismissing the petition.

The original petition which was dismissed by the Court, recites the organization of the several railroad companies, their routes and termini; the stockholdings and the parallelisms existing between these roads showing that they are naturally competing lines. It has been held by this Court that it will take judicial notice of the map to ascertain whether railroads are parallel and competing.

Louisville & Nashville R. R. Co. vs. Ky.,
161 U. S., 677.

And see also to same effect:

Gulf, Colorado & Santa Fe R. R. Co. vs. State, 72 Tex., 404;
State ex rel. Attorney General vs. Hocking Valley Ry. Co., 12 Ohio Circuit (N. S.), 49.

Likewise this Court will take judicial notice of the laws of the several states.

Lamar vs. Micou, 114 U. S., 218.

We shall now respectfully call attention to the law prevailing in the several states at the time of this consolidation and the parallelism of the several lines combined in the consolidation in violation of such laws.

Ohio.

The State of Ohio legislated directly upon this question. Paragraph 9027 of the General Code of Ohio, leaves no room for doubt that the provisions of the Ohio laws apply to the Lake Shore and New York Central Railroad Company. That section is as follows:

"A railroad company formed by the consolidation of a company or companies of this State, with a company or companies of another State or States, may make a further consolidation with a company or companies of another State or States owning continuous, connected, *but not parallel or competing lines.*" * * *

And Section 8683 is as follows:

"A private corporation may also purchase, or otherwise acquire, and hold shares of stock in other kindred *but not competing private corporations, domestic or foreign.* This shall not authorise the formation of a trust or combination for the purpose of restricting trade or competition."

The parallelism in the State of Ohio is shown by the map to be as follows:

From Conneaut, Ohio, to Cleveland, Ohio, the New York Central (formerly the Lake Shore), and the Nickel Plate are so closely parallel that they both pass through the Towns of Conneaut, Kingsville, Ashtabula, Geneva, Unionville, Madison, Perry, Painesville, Mentor, Willoughby and Cleveland; that from Cleveland, Ohio, to Edgerton, Ohio, a station

on the line of the New York Central (former Lake Shore), and from Cleveland, Ohio, to Paine, Ohio, a station on the Nickel Plate, the two systems are closely parallel.

The Lake Erie & Western Railway line controlled by the Lake Shore (Rec., 4) and the "Big Four" (Rec., 6) parallel each other within the State of Ohio from Sandusky, Ohio, and Cleveland, Ohio, to the western boundary line of the State of Ohio. They serve the same general territory and are naturally competing.

And again:

The Toledo & Ohio Central Railway Co. prior to the bringing of this suit and prior to December 23, 1914, was a subsidiary of the Lake Shore & Michigan Southern Railway Co. (Rec., 4-7), which owned substantially all the stock of the said Toledo & Ohio Central, and the control of the said Toledo & Ohio Central is now owned by the successor company, the New York Central Railroad Co.

The Toledo & Ohio Central owns and leases a system of railroads in Ohio with two separate but parallel lines running from Toledo, Ohio, southerly and southeasterly to the Ohio coal fields.

As bearing upon the proper construction of the Ohio statutes, as well as upon the question of actual parallelism, the case of *State vs. Vanderbilt*, 37 Ohio St., 590, is an instructive one. This was an action in *quo warranto* to test the legality of a consolidation of the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company and the Cincinnati, Hamilton & Dayton Railroad Company, the former of which owned and controlled a road running from Cleveland upon Lake Erie

by the way of Columbus, to Cincinnati, and the latter a road running from Toledo, at the western end of Lake Erie, by the way of Hamilton and Dayton to Cincinnati. The statute provided that companies might consolidate, where their lines were so constructed as to admit of the passage of burden or passenger cars over any two or more of such roads *continuously* without break or interruption. The Court held, that in view of the existence of large commerce from the southern States by way of Cincinnati to ports upon Lake Erie as well as from such points southerly, by railroad lines converging at Cincinnati, *these were substantially parallel and competing roads; that it might be inferred from the record that a leading object in making the consolidation was to destroy that competition;* and that upon this state of facts, these roads were not so constructed as to admit the passage of burden or passenger cars over two or more of such roads *continuously.*

Speaking through Mr. Justice Okey, at page 643, the Court said:

"In imposing that restriction upon consolidation, the Legislature intended, not merely that the physical fact should exist, but that such consolidation should only be made for the very purpose of passing freight and passengers over both lines or some material parts thereof, not necessarily in a direct or straight line, but continuously * * * and where companies situated as these are, being parallel and competing, claim authority to consolidate has been granted to them, they must be able to point to words in the Statute which admit of no other reasonable construction, for it will not be assumed that the lawmaking power has authorized the creation of a monopoly so detri-

mental to the public interest. But the Statute contains no such words. * * *

And the Court, at page 644, further said:

"Express provision, however, prohibiting one company from leasing to another where their lines were competing was made by the Act of 1873 (4 Sayler, 2950), and that provision was carried into the Rev. St., Sec. 300. From the absence of any such express prohibition with respect to consolidation, it is argued that here is a legislative expression that the fact that lines are competing is no objection to consolidation. But that conclusion in my judgment, is altogether erroneous. That it does not authorize a consolidation of lines bearing to each other the relation borne by these roads, is a proposition to which I fully assent. * * * But the policy of the State as declared in that enactment, cannot be in doubt."

This case was expressly approved in the *Louisville & Nashville* case (*supra*).

In *State ex rel. Attorney General vs. Hocking Valley Ry. Co.*, 12 Ohio Circuit (N. S.), 49, there was involved the parallel and competing character of the Kanawha and Michigan with the Hocking Valley and Toledo & Ohio Central. The Hocking Valley owned a line from Gallipolis on the Ohio River to Toledo on Lake Erie. It also owned all the stock of and therefore controlled the Toledo & Ohio Central which extended from Toledo to Corning, intersecting the Hocking Valley at Columbus. There were also some branch lines in the territory traversed by these two roads, the Kanawha & Michi-

gan extending from Corning (where it connected with the Toledo & Ohio Central) south to Athens (where it connected with the Hocking Valley) and thence southerly to Point Pleasant on the Ohio River; and thence southeasterly into the State of West Virginia where it traversed the Kanawha coal fields.

The Circuit Court of Franklin County, Ohio, held, first, that the Hocking Valley was a parallel and competing line with the Toledo & Ohio Central; and, second, that the Hocking Valley was a parallel and competing line of the Kanawha & Michigan. The Kanawha & Michigan in connection with the Toledo & Ohio Central forms a parallel and competing line from Ohio River northward to Toledo. It was held that the Hocking Valley had no right to control either the Toledo & Ohio Central or the Kanawha & Michigan.

An appeal was taken to the Supreme Court of Ohio; but after considerable delay the Hocking Valley got rid of the control of the Toledo & Ohio Central and of the Kanawha & Michigan, and dismissed its appeal.

The Circuit Court in its decision said, at page 66:

"In respect to the ownership of stock in the Kanawha Michigan Railway Company, it is admitted that the defendant owns the majority of such stocks, but claims that the line is not parallel nor competing. For more than one-third of its line the K. & M. is parallel to the defendant's line and is more or less competing, but its competing features are pronounced and made clearly apparent when it is viewed as a natural as well as actual connecting road of the T. & O. C. system. The

cases cited by the defendant's counsel where there is an inconsequential part of the line parallel and competing, but where in the general features of the two roads they are non-competing and not parallel, do not apply here, for a substantial part of the K. & M. line is parallel and competing in the coal mining business, which forms a substantial part of the carrying business of the railroad companies involved.

"In respect to the Toledo & Ohio Central Railway Company, it is conceded to be a parallel line with the defendant, but the defendant denies that it owns or holds the stock of the T. & O. C. Company. It is agreed, however, that the stock of the T. & O. C. Company is held by the same stockholders or their allied interests, to wit, the J. P. Morgan & Co. Syndicate and is officered by the same persons as the defendant. *Unity of stockholders' interests and unity of management is strong, if not conclusive, evidence of combination. This combination of parallel lines is restrictive of competition, and is contrary to the letter as well as the spirit of the corporation laws; it is difficult to conceive of competition, where one person and one agency controls both corporations. Can a shipper appeal with any hope of success for competition to two companies controlled by the same management?* A shipper appeals to Mr. Monserrat, as President of the defendant for rates or facilities, and is not able to obtain a satisfactory concession. He then desires to make application to the parallel line of the T. & O. C. and is compelled to go before the same President and same Board of Directors. A mere statement of the question is its own answer.

"The State is not bound to show in cases of combination a record of the agreement resulting in the destruction of competition. It is not to be anticipated that in every case where a combination actually exists it is reduced to formal written agreement, or that all stockholding combinations appear of record upon the stock books. A verbal or even secret combination is just as obnoxious to public interests. We may, therefore, look to the evidence as in other cases of conspiracy. Unity of stockholding interests and of management supplemented by the general plan of reorganization of the defendant company is sufficient to show a combination (*State ex rel. vs. Standard Oil Co., supra.*)

"The combination of the defendant, therefore, with the T. & O. C. Railway Co., as shown by the evidence referred to, as well as its ownership of a majority of stock of the K. & M. Company is illegal and unwarranted." * * * (Italics ours.)

Following the decision of the Circuit Court of Ohio in the *quo warranto* proceeding above mentioned, the trunk line syndicate made a new deal whereby a majority of the stock of the Hocking Valley Railroad was transferred to the Chesapeake & Ohio Railways; all the stock of the Toledo & Ohio Central was transferred to the Lake Shore & Michigan Southern Railway; and the controlling stock of the Kanawha & Michigan was split in two and exactly one-half transferred to the Chesapeake & Ohio and the other half to the Lake Shore & Michigan Southern with the understanding that they were to act in harmony in controlling the Kanawha & Michigan. This combination was successfully attacked by the U. S. Attorney General.

In the subsequent case of *Gould vs. Kanawha & Michigan R. R. Co.*, 10 Ohio Nisi Prius Reports (New Series), 313 *et seq.*, a majority stockholder of the last named company brought suit in the Common Pleas Court of Ohio against the Kanawha & Michigan, the Chesapeake & Ohio and the Lake Shore & Michigan Southern to enjoin the carrying out of the conspiracy and to restrain the Lake Shore & Michigan Southern and the Chesapeake & Ohio from voting any stock of the Kanawha & Michigan and restraining the Kanawha & Michigan from recognizing them as stockholders in any way, and because the transaction involved the consolidation of parallel and competing lines. After elaborate argument by eminent counsel covering four days, Judge Rogers of Columbus granted a temporary injunction restraining the commission of any acts in furtherance of the unlawful combination.

And see, also, Supplementary Opinion (10 Ohio N. P. Rep., N. S., 591).

In *Hafer vs. Cincinnati, H. & D. R. Co.*, 4 Ohio Decisions (Laning), 487, it was held that roads are competing if they are constructed to reach and connect the business centres on two waterways, for the traffic on which there will be natural competition, although they are not actually engaged in cutting rates, and a portion of the distance between the destination is covered by traffic arrangements with other roads.

And this is the public policy of most of the States as shown by the opinion of the Supreme Court of the U. S. in the *Louisville & Nashville case, supra*. The matter is summed up by this Court in these words:

"Indeed, the unanimity with which the States have legislated against the consolidation of competing lines shows that it is not the result of a local prejudice, but of a general sentiment that such monopolies are reprehensible."

These considerations of public policy are conclusive against the consolidation.

State ex rel. Atty. Genl. vs. Cinn. Gas Light Co., 18 Ohio St., 262.

Illinois.

The parallelism in Illinois as shown by the map is as follows:

From Ambler, Ill., situated near the eastern border line of the State of Illinois to Peoria, Ill., a station on the Lake Erie & Western, and from Danville, Ill., a station on the Peoria & Eastern Division of the Big Four, near the Indiana-Illinois border, to Peoria, Ill., the said Lake Erie & Western and the said Big Four are parallel lines; that they serve the same territory; that they are connected by a number of railway lines operated independently of the New York Central system; that they are potentially competing and parallel within the State of Illinois, and if operated independently could and would compete. From Chicago, Ill., to the eastern boundary lines of the State of Illinois, the New York Central (formerly Lake Shore), the Nickel Plate and the Michigan Central are closely parallel, passing through several common points, are potentially competing, and if independently operated could and would compete.

The Constitution of Illinois, Art. 1, Sec. 11, provides:

"No railroad corporation shall consolidate its stock, property or franchises, with any other railroad corporation owning a parallel or competing line * * *."

This provision has been sustained in *Patch vs. Wabash R. R.*, 207 U. S., 277, and has been also construed by the U. S. Circuit Court of Appeals for the Seventh Circuit in the case of *E. St. Louis Connecting Ry. Co. vs. Jarvis*, 82 Fed., 35; 34 C. C. A., 639, where the Court construed a lease of one railroad by another. Both were designated as belt lines and connected the termini of the different railroads running into E. St. Louis with the ferry transfer to St. Louis. One line was constructed on Front Street in St. Louis running along the water's edge, the other by a circuitous route connecting with the same railroads; both lines crossing and tapping all of the various railroads terminating at E. St. Louis. Construing the terms "parallel" and "consolidate" as used in the Constitution, the Court said (pages 646, 7, 8):

"The Constitution of the State of Illinois, Article II, Sec. 11, provides: 'No railroad corporation shall consolidate its stock, property or franchise with any other railroad corporation owning a parallel or competing line.' Were these two railways 'parallel or competing lines,' within the meaning of this provision? * * * We cannot doubt that these lines are 'parallel lines' within the meaning and intent of the constitutional provision. The term 'parallel' is not employed in the

constitution in its merely geographical sense. It does not mean two lines of railway that are equi-distant from each other. That would be a narrow construction of the constitutional provision, which would defeat its purpose. It means lines of railway having the same general direction, and, therefore, likely to come in competition with each other. We also think it clear, upon the evidence and from the charters of the companies, that they were, and were designed to be, competing lines of railway. The Venice & Carondelet Railway crossed all the lines of railway which were crossed by the railway of the E. St. Louis Connecting Railway Company. The one company connecting with the Madison Ferry Transfer on the north, and with the ferry transfer of the Illinois & St. Louis Railroad & Coal Company on the south. The other company connected with the Wiggins Ferry Company, which latter company owned practically all of its stock. Necessarily they would compete with each other with respect to the transfer to the ferry companies of cars coming to E. St. Louis over the lines of any railway which they both crossed. It is true that, with respect to certain local industries, they were not competing, because both had not access to them; but the principal business designed was the transfer of through traffic to the City of St. Louis, and the one company in connection with the ferry companies with which it connected, was the competitor of the other. We think this plain upon its face, and that no elaboration could strengthen the statement. * * *

"Is a lease for 10 years a consolidation of the franchises or property within the constitu-

tional provision? It is contended that the term 'consolidation' means a permanent union of the interests, management, and control of two roads, either in the formation of a new company out of the consolidated one, or else by consolidated management of the old ones unitedly while their distinct corporate entities still remained. This distinction is true in the general sense in which one speaks of the 'consolidation' of railroads. The term may also mean the act of forming into a more firm or compact mass, body, or system. The constitutional convention, representing the people of the state, sought to provide against monopolies, and to preserve to the public the benefit that would accrue from competition between parallel or competing lines of railway. It sought for practical results. It intended to provide that parallel or competing lines should continue to be competing, and this it aimed to accomplish by prohibiting the consolidation of the stock or the franchises or the property of any such competing lines of railway. The union of such lines was prohibited, in view of the objects sought to be accomplished. The term 'consolidate' we think, must be construed to have been used in the sense of 'join' or 'unite.' To permit two such competing lines of railway under a single management and a single control would accomplish the very purpose which the constitution sought to prevent. We must have regard to the spirit and the object of that constitutional provision, and not juggle with the technical meaning of the word. The prohibition goes to the consolidation or uniting of the stock of two competing roads,

or of the franchises of two competing roads, or of the property of two competing roads. The doing of either would create the prohibited monopoly, and either is within the intendment and meaning of the constitutional provision. * * *

"Whatever produces the prohibited result is obnoxious to the spirit and the letter of the constitutional provision, and is illegal. We must deal with the result accomplished, without regard to the means employed. It cannot be permitted that one may effect a prohibited result by indication, which he may not lawfully accomplish by direct means. We must, therefore, hold that the leases in question *practically effected a consolidation* of the properties of two competing lines, and are within the inhibition of the constitution" (*Morrill vs. Railroad Co.*, 55 N. H., 531; *Gulf C. & S. F. Ry. Co. vs. State*, 72 Tex., 404, 10 S. W., 81; *State ex rel. Leese vs. Atchison & N. R. Co.*, 24 Neb., 143, 38 N. W., 43).

And in the General Consolidation Act of Illinois (Sec. 8), it is ordained:

"Provided that railroad corporations shall not consolidate their stock, property or franchises with any other railroad corporation owning a *parallel or competing line*."

Pennsylvania.

The parallelism in Pennsylvania as shown by the map is as follows:

From Northeast, a town in Northwestern Pennsylvania to Springfield, Pa., the New

York Central (road of the former Lake Shore), and the Nickel Plate are parallel and each of the systems pass through the Towns of Northeast, Moorehead, Erie, Fairview, Girard and Springfield, and that they serve the same territory, and are potentially competing within the State of Pennsylvania, and if independently operated, could and would compete.

Sec. 4, Article XVII of the Constitution of Pennsylvania, provides:

"Consolidation prohibited. Restrictions on officers:

"No railroad, canal or other corporation or the lessees, purchasers, or managers of any railroad or canal corporation, shall consolidate the stock, property, or franchises of such corporation, with or lease, or purchase the works or franchises of, or in any way control any other railroad or canal corporation owning, or having under its control, a parallel or competing line; nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation owning or having the control of a parallel or competing line; and the question whether railroads or canals are parallel or competing lines, shall, when demanded by the party complainant, be decided by a jury as in other civil issues."

The Public Laws of Pennsylvania of 1907, page 385, No. 281, provides that:

"That from and after the passage of this Act, it shall not be lawful for any railroad cor-

poration created by or existing under the laws of this Commonwealth, to acquire, purchase or guarantee the stock bonds or other securities of, or lease or purchase the works or franchises of, or *in any way control*, any street passenger railway corporation owning or having under its control a parallel or competing line with said railroad."

The Pennsylvania Act of 1901, No. 216:

"Provided, that nothing in this Act shall be construed so as to permit railroad, canal or telegraph companies, which own, operate or in any way control parallel or competing roads, canals or lines, to merge or combine * * *."

The Pennsylvania Act of 1865, No. 35:

"And provided further, That nothing in this Act contained, shall be taken to authorize the consolidation of any company or corporation, of this Commonwealth, with that of any other State, *whose laws shall not also authorize the like consolidation.*"

It has been definitely held in Pennsylvania that a purchase of a controlling interest in the stock of a railroad company, by another railroad company not parallel or competing, but at the instance of a third company, which is parallel and competing, and which furnishes the consideration for the purchase is within the prohibition of the above section of the Pennsylvania Constitution.

Pa. R. R. Co. vs. Commonwealth, 7 Atl., 368, affirming *Comm. vs. So. Penna. R. R. Co.*, 1 Pa. Co. Ct., 214 (1886).

See, also:

Pa. R. R. Co. vs. Comm., 7 Atl., 374, affirming *Comm. vs. Beach Creek*.
Comm. vs. Beach Creek, Clearfield & S. W. R. R. Co., 1 Pa. Ct., 223.

With reference to the clause in the Pa. Constitution prohibiting the interlocking of officers and Directors, it appears that the Act of May 31, 1907, was passed (P. S., 353) to carry this section into effect.

Michigan.

The parallelism in Michigan as shown by the map is as follows:

Across the State. Detroit-Chicago Line.

On the Detroit-Toledo (O.)¹ Line within the State of Michigan from Detroit, Michigan, south to the boundary line between Michigan and Ohio, and thence to Toledo, the Lake Shore and Michigan Central are closely parallel, having many common points, and serve the same territory. It also appears that each of said lines serves the cities of Niles, Benton Harbor, Kalamazoo, Three Rivers, Grand Rapids, Lansing, Jackson, Ypsilanti, Detroit, Delray, Wyandotte and Monroe in the State of Michigan.

The Constitution of Michigan Article XIX-A, Sec. 2), provides:

"No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation, owning a parallel or competing line, and in no case shall any consolidation take place except upon public notice given at least 60 days to all stock-

holders in such manner as shall be provided by law."

The Michigan Consolidation Act of 1899 contains the following clause: Provided, that no such companies owning parallel or competing lines shall be permitted to consolidate themselves into one corporation. * * * This proviso was re-enacted in the Laws of 1891.

But while this is so, the Legislature of Michigan provided by statute (Compiled Laws of Mich., 1897, Sec. 6254) that no railroad company, either in or out of the State, or partly within or partly without the State, owning parallel or competing lines, shall consolidate into one corporation.

The above section of the Michigan Constitution is a literal copy of the Illinois Constitution, and, therefore, the construction placed by the United States Court of Appeals of the 7th Circuit in *E. St. Louis Conn. Rys. vs. Jarvis*, 92 Fed., 735, is applicable to the Michigan Constitution.

See, in this connection, *Richardson vs. Buhl*, 77 Mich., 632; *White Star Line vs. Star Line of Steamers*, 141 Mich., 604; and *Attorney General ex rel. Wolverine Fish Co. vs. Booth & Co.*, 143 Mich., 89.

These cases also show how fully the Courts in that State hold that where there are several remedies against a combination in restraint of trade they are cumulative. The last cited case is also an authority for the proposition that these Michigan statutes extend, in their prohibitive provisions, to foreign, as well as to domestic, corporations.

Indiana.

In Indiana, like in New York and Ohio, there are no constitutional inhibitions against a consoli-

dation of railroad corporations owning or controlling parallel or competing lines, but the general policy of the State, its Anti-Trust legislation and the decisions of the highest Courts of the States, expressly condemn such a course. We shall give here a few pertinent decisions relating to the subject:

"A contract between corporations charged with a public duty, such as common carriers, providing for the formation of a combination having no other purpose than that of stifling competition, and providing means to accomplish that object, is illegal. The purpose of breaking down competition, poisons the whole contract and there is no antidote which will rescue it from legal death."

Cleveland, etc., R. Co. vs. Closter, 126 Ind., 391.

The public policy of Indiana to prevent the creation of monopolies and to foster fair competition, prohibits one railroad from controlling through stock ownership or otherwise another railroad owning a parallel or competing line. This was held in

Eel River R. R. Co. vs. State, 155 Ind., 433.

And see, generally:

Indianapolis Union R. Co. vs. Dohn, 153 Ind., 10.

Indiana vs. Portland Gas Co., 153 Ind., 483.

Board vs. Lafayette R. R. Co., 50 Ind., 85.

Chicago I. & L. Ry. Co. vs. Southern Ind. Ry. Co., 38 Ind. App., 234.

The parallelism in Indiana of the lines as shown by the map is as follows:

From Butler, Ind., a station on the Lake Shore near the eastern border of Indiana, to Gary, Ind., near the western border of Indiana and from Edgerton, Ind., a station on the Nickel Plate near the eastern border of Indiana to So. Gary, a station on the Nickel Plate near the western border of Indiana, the said Lake Shore and Nickel Plate roads are closely parallel, the widest point of divergence between the two systems being between Fort Wayne on the Nickel Plate and Waterloo on the Lake Shore; that the two systems serve the same territory; that they are connected by many railway lines independent of the New York Central system, and that they are parallel and potentially competing within the State of Indiana, and under independent management could and would be competing lines.

From Brice, Ind., a station on the Lake Erie & Western near the eastern border line of Indiana, to Lafayette, Ind., and from Union City, Ind., a station on the line of the Big Four near the eastern border line of Indiana, to Lafayette, Ind., and from thence to the western border of Indiana, the said Lake Erie & Western and the said Big Four are parallel lines; that they serve the same territory, that they both pass through the Cities of Muncie, Indianapolis and Lafayette; that they are connected by many independent lines and that they are parallel and potentially competing within the State of Indiana; and if operated independently could and would compete.

The Big Four from Goshen, Indiana, to Anderson, Ind., and the Lake Erie & Western from Michigan City, Ind., to Indianapolis are parallel and potentially competing lines; that they are connected by many railway lines operated independently of the New York Central system; and that if operated independently they could and would be competing lines within the State of Indiana.

The summary of the facts and law relating to the cause of action based on the violations of the State laws clearly shows this bill states a good cause of action in equity as against a general motion to dismiss and that the action of the Court in dismissing the entire bill is erroneous. Moreover, the same bill was before the same Circuit Court of Appeals on the first appeal and the cause was reversed on the ground that the District Court erred in dismissing the entire bill, with mandate that the cause proceed on the cause of action showing that the consolidation was illegal under the laws of the several States pleaded in the petition (Opinion, Rec., 129-30). No reason is perceived why the Court on the second appeal should order the cause dismissed on an identical motion.

VII. The acquisition by the New York Central of the stocks of the competing railroads constitutes a virtual consolidation between it and such railroads.

It is contended by the appellees that inasmuch as the consolidation agreement is between the New York Central and the Lake Shore; that it does not include the properties and franchises of the Michigan Central "Big Four" the "Nickel Plate" R. R. or Western Transit Company, and

that, therefore, there was in fact no consolidation of the aforesaid lines involved, but this contention is untenable in view of the decision in the *Union Pacific* case (226 U. S., page 28), where Mr. Justice Day said:

"The consolidation of two competing systems of railroads engaged in interstate commerce by a transfer to one of the dominating stock interest in the other, creates a combination which restrains interstate commerce within the meaning of the statute, because in destroying or greatly abridging free operation of competition theretofore existing, it tends to higher rates,"

and in this connection the Court approves the *Pearsall* case in 161 U. S., and the Joint Traffic Association case reported in 171 U. S., 505.

And in the following cases the control by lease or majority stock amounted to consolidation within the prohibition of the statute against the consolidation of parallel or competing lines.

E. St. Louis Connecting Ry. Co. vs. Jarvis, 92 Fed., 735; 34 C. C. A., 639.

Gere vs. N. Y. C. R. R. Co., 19 Abb. N. C., 193, 210.

In *Pearsall* vs. *Great Northern Ry. Co.*, *supra*, it was held that an arrangement whereby one railroad company in return for a guarantee of its bonds by another company owning a parallel and competing road was to turn over one-half of its stock to the stockholders of the latter company or to a Trustee for their benefit, constituted a clear violation of the statute prohibiting railroad companies from consolidating with or in any way own-

ing or controlling other corporations having parallel or competing lines, and in the case of the *Pa. R. R. Co. vs. Commonwealth*, 7 Atlantic, 368, it was held that the purchase by one corporation of a sufficient amount of the stock of another corporation owning a parallel and competing line, to give control of the latter, was in contravention of the Pennsylvania statute prohibiting the consolidation of corporations owning parallel or competing lines, and to the same effect see also *Pa. R. R. Co. vs. Commonwealth*, 7 Atlantic Rep., 374.

Agreements pooling stocks have been held invalid under statutes prohibiting consolidation in the following cases:

Currier vs. Concord R. R., 48 N. H., 321.
Morrill vs. R. R. Co., 55 N. H., 531.
Manchester, etc., R. R. Co. vs. Concord R. R. Co., 66 N. H., 100.
Gulf, etc., R. R. vs. State, 72 Texas, 404.
People vs. N. R. Sugar Ref. Co., 121 N. Y., 582.
Pearshall vs. Great Northern Ry. Co., 161 U. S., 646.
People ex rel. Fitz Henry vs. Union Gas & Electric Co., 254 Ill., 395.
Chicago Union Traction Co. vs. Chicago, 199 Ill., 579.
Chic., St. Fe & C. Ry. Co. vs. Ashling, 56 Ill. A., 327; affirmed in 160 Ill., 373.
E. St. Louis Conn. Ry. Co. vs. Jarvis, 92 Fed., 735.
Southern Electric Securities Co. vs. State, 44 So., 785.
George vs. Central R. R. & Bkg., 101 Ala., 607.

State vs. Standard Oil Co., 49 Ohio St., 137.

People ex rel. Peabody vs. Chicago Gas Trust Co., 130 Ill., 268.

"If a corporation is authorized to sell gas in certain limits of the city, and is permitted to acquire the controlling interest in the stock of another corporation authorized to sell gas in another part of the city, and by such controlling interest to practically take possession and manage the affairs of such other corporation, it is, in effect, engaging in a business other than that authorized by its charter."

State ex rel. Jackson vs. Newman, 51 La. Anno., 833, 838.

"A combination of two or more corporations, even for a legitimate purpose, may be subject to attack if a trust form is adopted, on the ground that each constituent corporation has violated some provision of its charter or some principal of the law of its creation."

Southern Electric Securities Co. vs. State, 44 So., 785.

"An agreement to surrender shares of stock in different companies to a Trustee, who will elect Directors and control companies in the interest of the trust is illegal."

State vs. Standard Oil Co., 49 Ohio St., 137, 138.

See:

Northern Securities case, 193 U. S., 197.

Standard Oil case, 221 U. S., 1.

Tobacco case, 221 U. S., 106.

Harriman vs. Northern Securities Co., 197 U. S., 244.

All of which cases hold that a consolidation or merger is effected through stock ownership, and the term "consolidation" is within the meaning of the statute, prohibiting the consolidation of parallel or competing lines, including the lease of such lines, and is generally used to describe a union of corporate properties and stockholders by the process of absorption or combination, and has a broader meaning, and is used in the sense of "join" or "unite."

A constitutional or statutory provision against the "consolidation" of competing lines includes any agreement whereby the roadbed, rolling stock and equipment of one competing line are to be operated and controlled by another. The words are used in the sense of "join" or "united" and has been held to include leases by the one to the other.

State ex rel. Leese vs. Atchison, etc., R.
R., 24 Neb., 143, 164.

In view of these authorities, it is idle to contend that the Michigan Central and the other roads, which the New York Central controls, are not in the consolidation. Equity looks to substance rather than form.

Thus, in *International Harvester Co. vs. Missouri*, 234 U. S., at page 209, the Court said:

"It is too late in the day to assert against statutes which forbid combinations of competing companies, that a particular combination was induced by good intention and has had some good effect. The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it."

Cited in *United States vs. Reading Co.*, 253 U. S., 26, in which case the Court, at page 57, in referring to the control by the Reading Co. of the Reading Railway Company and Central R. R. Co., of New Jersey, said:

"This acquisition placed the holding company in a position of dominating control not only over two great competing interstate railroad carriers, but also over two great competing coal companies engaged extensively in mining and selling anthracite coal, which must be transported to interstate markets over the controlled interstate lines of railway. * * * That such a power so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act, has been frequently held by this Court."

A comparison of the situation of the Reading Company with the New York Central will disclose a much worse state of affairs than the one involved in the Reading case. The New York Central controlled three competing railway lines and one steamship line from Buffalo to Chicago, two of which lines ran via Cleveland and one via Detroit and still another line (Big Four) from Cleveland to Chicago; two competing lines from Buffalo to New York; two competing lines from Detroit to Chicago; two competing lines from Detroit to Toledo; and two competing lines from Toledo into the Ohio Coal fields. It may be also noted that the Northern Securities and Union Pacific cases each involved two competing lines.

Conclusion.

For the foregoing reasons, we respectfully pray that the judgment of the United States Circuit Court of Appeals may be reversed with such directions as this Court may deem proper.

Frederick A. Henry,
Elijah N. Zoline,
Counsel for Appellant.